No. 3676

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE ROSS-HIGGINS COMPANY, a Corporation,
Plaintiff in Error,

vs.

L. F. PROTZMAN and F. S. GORDON,
Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Territory of Alaska, Fourth Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

Names and Addresses of Attorneys of Record.

LOUIS K. PRATT, Attorney for Plaintiff and Plaintiff in Error,
Fairbanks, Alaska.

A. R. HEILIG, Attorney for Defendants and Defendants in Error,
Fairbanks, Alaska. [1*]

In The District Court For The Territory of Alaska,
Fourth Division.

No. 1624.

THE ROSS-HIGGINS COMPANY, a Corporation,
Plaintiff,

vs.

L. F. PROTZMAN and F. S. GORDON,
Defendants.

Praecipe for Transcript of Record.

The clerk will please prepare and certify to a transcript of the record in this action, for use as the basis of a writ of error sued out by the plaintiff, as follows:

1st. The defendants' amended demurrer to the original complaint.

2nd. The amended complaint filed by plaintiff.

3rd. The answer of defendants.

4th. The motion of plaintiff asking that a part of its amended complaint and parts of the answer be stricken out.

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*Page-number appearing at foot of page of original certified Transcript of Record.

5th. The amended answer.

6th. The motion of plaintiff to strike out parts of the amended answer.

7th. Plaintiff's demurrer to certain of the defenses in the amended answer.

8th. The reply.

9th. The findings of fact and conclusions of law as signed by the Judge and entered of record.

10th. The plaintiff's "objections, eliminations, substitutions, corrections and additions" as affecting the findings and conclusions tendered by defendants' attorney.

11th. The exceptions to the findings of fact and conclusions of law. [2]

12th. The motion for a new trial.

13th. All journal entries made during the progress of the case including the final judgment.

14th. The opinion of the trial Judge.

15th. All papers connected with the writ of error, except the writ of error, citation and order enlarging the return day of the writ of error. The last three are original papers and must be forwarded to the Appellate Court at San Francisco, California.

LOUIS K. PRATT,
Attorney for Plaintiff Below and Plaintiff in Error.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Feb. 17, 1921. H. Claude Kelly, Clerk. By R. H. Geoghegan, Deputy. [3]

[Title of Court and Cause.]

Amended Demurrer to Complaint.

Come now the defendants and demur to the complaint filed in this action upon the following grounds:

1. That it does not appear upon the face of said complaint that the plaintiff has legal capacity to sue.

2. That the plaintiff has no legal capacity to sue or bring this action in that it is a foreign corporation doing business in Alaska and the complaint does not show that it has complied with the provisions of Chapter 23, Part V, of Carter's Alaska Codes.

That the complaint does not state facts sufficient to constitute a cause of action.

A. R. HEILIG,
Atty. for Defts.

Received copy May 11, 1912.

LOUIS K. PRATT & SON,
Atty. for Pltff.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. May 11, 1912. C. C. Page, Clerk. By H. C. Green, Deputy. [4]

[Title of Court and Cause.]

Order in re Demurrer to Original Complaint.

The Court having heretofore heard argument on defendants' demurrer to plaintiff's complaint here-

in and taken the same under advisement, and being now fully and duly advised in the premises, renders its oral opinion in open court:

Now, therefore, it is ordered that the first ground of defendants' demurrer, as set forth in defendants' amended demurrer to complaint, be, and the same is, hereby sustained.

It is further ordered that the second ground of defendants' demurrer to plaintiff's complaint, as set forth in defendants' amended demurrer, be, and the same is, hereby overruled.

It is further ordered that plaintiff herein be, and it is, hereby granted sixty days in which to amend its complaint herein.

Done in open court at Fairbanks, Alaska, this 31st day of May, 1912.

PETER D. OVERFIELD,
District Judge.

Entered in Court Journal No. 12, page 38.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. May 31, 1912. C. C. Page, Clerk. By H. C. Green, Deputy. [5]

[Title of Court and Cause.]

Amended Complaint.

The plaintiff, by leave of Court, files this its amended complaint, and for a cause of action against the defendants alleges:

I.

That at all times mentioned herein, it was a cor-

poration, duly organized and existing under and by virtue of the laws of the State of Oregon; that it became such corporation under said laws in the year 1900 and afterwards transacted a general mercantile business in the Territory of Alaska, its principal place of business being at Skagway with a branch store at Fairbanks, in the then Third, now Fourth Judicial Division, at which last mentioned point the plaintiff conducted the said branch store during the year 1906 and a part of 1907; that on or about June or July of 1907 it closed out its mercantile business in the Territory of Alaska, and sold off its stock in trade and from that time on transacted no corporate business in the said Territory, other than such as was necessary in winding up its affairs in paying its debts and collecting its outstanding accounts; that before commencing and during the time it transacted a mercantile business in Alaska, as aforesaid, it complied with the provisions of Chapter 23, page 401, Carter's Alaska Code, on the subject of Foreign Corporations, by filing in the office of the Secretary of the said Territory of Juneau, Alaska, and also in the office of the Clerk of the District Court for the First Judicial Division at Juneau, an authenticated copy of its articles of incorporation, a written statement containing the information required by section 225, page 401, C. A. C., its consent [6] in writing to be sued in the District of Alaska, and the designation of a person upon whom service of process might be made in said Territory and the acceptance of such designation and consent of such person in writing to act in that capacity for the plain

tiff company; that thereafter, and during the time that it was engaged in business in Alaska, it filed the annual written statement required by section 229, page 402, C. A. C., in the office of the Secretary of said District at Juneau, and also a duplicate thereof in the office of the Clerk of the District Court for the First Judicial Division at Juneau and with the Clerk of the District Court for the Third, now the Fourth Judicial Division of Alaska at Fairbanks.

II.

That on the 20th day of August, 1908, the plaintiff commenced an action in the said court numbered on the records thereof 1095, entitled "The Ross-Higgins Company, a Corporation, Plaintiff, vs. Alfred M. Ohlsen, Doing Business in the Name of The Fox Trading Company, Defendant"; that in the said action and at the commencement thereof, the said plaintiff caused a writ of attachment to issue against the property of the said defendant Alfred M. Ohlsen, and placed the same in the hands of the marshal of the said Division, for service, who on the 27th day of August, 1908, levied the same upon a stock of merchandise and fixtures belonging to the defendant Ohlsen, of the value of nineteen hundred dollars ($1900), the said personal property so attached being described as follows:

2500# flour (soft).
800# flour (hard).
2¾ cases Lubeck spuds.
95# dried fruit.
3 cases Agen butter.
1 case mutton.

3 cases sausage, etc.
1 case canned cabbage.
About $10.00 drugs.
1 case Ivory soap.
12# assorted tobacco.
5# starch.
13 pkgs. yeast.
¾ case soda.
11 pkgs. currants.
6 cans spices.
136 cans asstd. canned goods. [7]
20 cans salmon.
21 cans clams.
12 cans sausage.
42 cans sardines.
11 pkgs. grape nuts.
2 cartons soap.
14 pr. rubber boots.
One ½ keg corn beef.
One ½ pickled pork.
15# smoked mat.
2 and one-half gal. Molasses.
5# macaroni.
3 gal. honey.
2 gal. syrup.
1 case ox tongue.
13 bot. pickles.
3 bot. olive oil.
32 pkgs. oats.
50# lard.
13 pkgs. Bromangelon.

14 cans eggs.
7 pkgs. Germea.
3 pkgs. Force.
34 pkgs. L toilet soap.
425# beans.
400# rice.
10 pr. rubber boots.
8¾ cases Eagle Milk.
1 case clams.
1 case lunch tongue.
3 cases corn beef.
20 boxes candies.
1 can matches.
20# sugar.
About $75 asstd. fittings.
50# dried peaches.
6 hammers.
2 and one-half kegs nails.
2 windows.
2 scales.
1 gold scale (32).
1 small showcase.
2 counters.
75# cheese.
5 pocket-knives.
19 graniteware utensils.
6 bake pans.
3 water buckets.
3 small fry-pans.
1 large.
4 tube.
4 brooms.
1 coil rope.

40# buckwheat.
90# rolled oats.
20# tapioca.
1 doz. chimneys.
1 half roll paper.
6 axes.
About $10.00 hardware.
1 kit mackerel.
20 joints stove-pipe.
1 jack plane.
1 sluice fork.

That thereafter and on September 7, 1908, the said attached property was claimed by one Peter Vachon pursuant to section 145, page 175, Carter's Alaska Code, who thereupon caused to be executed the bond provided for in the said section to secure the release of the possession of the said attached property, which said bond was signed by the defendants L. F. Protzman and F. S. Gordon, as sureties; whereupon the said marshal, by reason of the giving of the said bond, released his possession of the said attached property and delivered the same to the said claimant, Peter Vachon; that the obligee in the said forthcoming bond so executed by the defendants was H. K. Love, the marshal of said Division, who on December 9th, 1910, assigned all his right, title, and interest therein to the plaintiff. The said bond and assignment are in words and figures as follows:

In the District Court for the Territory of Alaska, Third Division.

No. 1095.

THE ROSS-HIGGINS CO., a Corporation,
Plaintiff,

vs.

ALFRED M. OHLSEN, Doing Business in the Name of the FOX TRADING CO.,
Defendant.

Bond on Release of Attachment.

Whereas, the above-named plaintiff commenced an action in the District Court for the Territory of Alaska, Third Division, against [8] the above-named defendant claiming that there was due to said plaintiff from said defendant the sum of fifteen hundred eighty-nine dollars and seventy-two cents, together with eight per cent per annum interest from January 1st, 1908, and thereupon an attachment issued against the property of the said defendant as security for the satisfaction of any judgment that may be recovered therein and certain property and effects claimed to be the property of the said defendant has been attached and seized by the United States Marshal for the Third Division of the Territory of Alaska, under and by virtue of the said writ; and

Whereas, Peter Vachon at the time and before the commencement of said suit, and at the time and before the levy of said writ had a chattel mortgage

upon all of said property so attached, which said mortgage is dated the 8th day of April, 1908, and made by A. M. Ohlson to Peter Vachon, which said mortgage was recorded on the 9th day of April, 1908, at 20 minutes past 12 noon, and recorded in Vol. 2 of Chattel Mortgages in the office of the Recorder of the Fairbanks Recording District, Territory of Alaska, and which said mortgage and the amount due thereon and secured thereby has not been paid, nor any portion thereof, and the said mortgage at the time of the commencement of said action and the issuance of said writ and the levy upon said property was in full force and effect and is now in full force and effect, and the said Peter Vachon is the owner and holder of the note secured by said mortgage, and the owner of said mortgage, and was at the time of the commencement of said action and issuance of said writ and the levy upon said property, and claims the said property by virtue of said chattel mortgage.

Now, therefore, we, the undersigned, residents of the Territory of Alaska, in consideration of the premises and in consideration of the delivery of said property to the said Peter Vachon do hereby jointly and severally undertake in the sum of two thousand dollars and promise and engage to redeliver the said property or pay the value thereof to the said United States Marshal to whom execution upon a judgment obtained by plaintiff in said action may be issued. [9]

L. F. PROTZMAN. (Seal)
F. S. GORDON. (Seal)

Witnesses:

W. F. WHITELY.
J. S. STERLING.

United States of America,
Territory of Alaska,—ss.

L. F. Protzman and F. S. Gordon, being each duly sworn, deposes and says: That he is a resident of the Territory of Alaska; that he is not a counsellor or attorney at law, marshal, deputy marshal, clerk of the court or other officer of the court; that he is worth the sum of two thousand dollars over and above his just debts and liabilities in property exempt from execution.

L. F. PROTZMAN.
F. S. GORDON.

Subscribed and sworn to before me this the 6th day of September, 1908.

[Seal] M. L. SULLIVAN,
Notary Public for Alaska.

The foregoing undertaking is satisfactory to me, and the marshal's office is at liberty to turn the attached property over to Mr. Vachon.

Dated at Fairbanks, Sept. 7th, 1908.

LOUIS K. PRATT,
Plffs. Atty.

I hereby assign and set over to the plaintiff in above case, Ross-Higgins & Co., all my right, title, and interest in the foregoing bond.

At Fairbanks, Alaska, Dec. 9, 1910.

H. K. LOVE,
U. S. Marshal.

[Endorsed]: No. 1095. #2096. In the District Court for the Territory of Alaska, Third Division. Ross-Higgins Co., Plaintiff, vs. Alfred M. Ohlsen, Defendant. Bond on Release of Attachment and Assignment by U. S. Marshal. Filed in the District Court, Territory of Alaska, 4th Div. Dec. 9, 1910. C. C. Page, Clerk.

III.

That thereafter such proceedings were had in the said cause that on the 9th day of January, 1911, the said Court rendered judgment and decree in the said action 1095 in favor of plaintiff therein, The Ross-Higgins Company, a corporation, and against [10] the said Alfred M. Ohlsen, the defendant therein, for the sum of one thousand three hundred and sixty-seven dollars and fifty cents ($1,367.50) debt, and for the further sum of thirty-seven dollars and thirty-five cents ($37.35) as the costs and disbursements of the action, and in the same judgment and decree foreclosed the said plaintiff's attachment lien upon the property above described and ordered that the same be sold to satisfy the said judgment and the costs.

That thereafter and on the 6th day of February, A. D. 1911, plaintiff in the said action number 1095 and also the plaintiff in this caused a special execution to issue out of said court directed to the marshal of the Fourth Division, requiring him to seize and take into his possession the said attached property and sell the same in the manner provided by law and apply the proceeds thereof upon the said judgment and costs and make return of the said writ

within sixty days of the date thereof, which said special execution was by the said plaintiff delivered to the marshal of the said division for service, who did on the 27th day of February, 1911, demand of the said Peter Vachon and the defendants in this cause a delivery of the said attached property to him, the said marshal, or its value, to enable him to execute the said special execution; that the said Peter Vachon, and especially the defendants herein, failed, neglected and refused to so deliver the said attached property to the marshal or pay to him the value thereof, and the marshal was compelled to and did, in fact, on the 1st day of March, 1911, return the said execution into the said court wholly unsatisfied.

IV.

That the said judgment and decree above described remains of record in the said court in full force and effect and wholly unsatisfied, and by reason of the premises the plaintiff has been damaged by the defendants in the full sum of said judgment and costs and the accrued interest thereon.

WHEREFORE the plaintiff prays judgment against the defendants for the sum of Fourteen Hundred and Four Dollars and Eighty-five [11] Cents ($1404.85), together with eight per cent (8%) per annum interest thereon from January 9th, 1911, and for the costs and disbursements of the action.

LOUIS K. PRATT & SON,
Attorneys for Plaintiff.

United States of America,
Territory of Alaska,—ss.

Louis K. Pratt on oath says: That he is one of the attorneys for the plaintiff herein, a foreign corporation; that this action is based on the forthcoming bond given by the defendants in connection with attachment proceedings in the case No. 1095 on the records of this court entitled "The Ross-Higgins Company, a Corporation, Plaintiff, against Alfred M. Ohlsen, Doing Business in the Name of the Fox Trading Company, Defendant," in which last-mentioned case affiant was attorney for the plaintiff therein; that the bond in this action provides for the delivery of attached property or the direct payment of the value of the said property in money, which said bond is now in the files of said court in the said cause No. 1095; that he has read the foregoing amended complaint and knows the contents thereof, and the same are true, as he verily believes.

LOUIS K. PRATT.

Subscribed and sworn to before me this 7th day of Aug., 1912.

[Seal] HARRY E. PRATT,
Notary Public in and for Alaska.

Received copy Aug. 7, 1912.

A. R. HEILIG,
Atty. for Dfts.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Aug. 7, 1912. C. C. Page, Clerk. By P. R. Wagner, Deputy. [12]

[Title of Court and Cause.]

Answer.

Come now the defendants and for answer to the amended complaint herein—

Answering paragraph I they deny that the principal place of business of the plaintiff corporation was at any time in Skagway, Alaska, and deny that at any time other than on August 14, 1906, said corporation filed with the clerk of the District Court for the Third, now Fourth, Division of Alaska at Fairbanks, the annual statement required by section 229, part V, of Carter's Code of Alaska.

Answering paragraph II they deny that on August 27, 1908, the marshal of said division levied a writ of attachment upon the stock of merchandise and fixtures belonging to A. M. Ohlsen of the value of $1900 and itemized in said paragraph, or upon any part thereof, and deny that the articles mentioned in the itemized list contained in said paragraph were worth on said date a greater sum than $1300.

Answering paragraph III they deny that the Court foreclosed plaintiff's alleged attachment lien upon the property in said complaint described.

They deny each and every allegation contained in paragraph V.

For a further defense and as a bar to this action defendants allege:

That on the 18th day of July, 1906, and continuously thereafter the principal place of business in Alaska of said corporation was at Fairbanks,

Alaska; that the object of action No. 1095 described in paragraph II of the complaint, brought by plaintiff [13] herein against A. M. Ohlsen was to recover a debt due for merchandise sold at Fairbanks, Alaska, by said plaintiff to said A. M. Ohlsen; that at no time did said plaintiff file in the office of the clerk of the District Court for the Third, now Fourth Judicial Division of Alaska, at Fairbanks, a duly authenticated copy, or any copy whatever, of its charter or articles of incorporation as required by law, and by reason of its failure so to do the contract sued upon in this action is void.

For a second and further defense to this action defendants allege:

That the property described in paragraph II of the complaint herein and for which the undertaking set out in said complaint was given, at the time of the attempted execution of the writ of attachment in said complaint described did not belong to A. M. Ohlsen, or any part thereof.

For a further defense to this action defendants allege:

That at the time of the issuance of the writ of attachment described in said complaint all the property described in paragraph II thereof was subject to the lien of a mortgage given by the said A. M. Ohlsen to the said Peter Vachon on the 8th day of April, 1908, to secure the payment by the said Ohlsen to the said Vachon of $500 on May 15, 1908, $1500 on June 1, 1908, $500 on June 15, 1908, $500 on July 1, 1908, $425 on July 15, 1908, and $427.07 on August 1, 1908, which mortgage was duly executed

and acknowledged on the 8th day of April, 1908, by the said A. M. Ohlsen, and on the same day said A. M. Ohlsen and said Peter Vachon each made affidavit thereto and thereon to the effect that the same was made in good faith to secure the amount named therein and without any design to hinder, delay or defraud creditors, and was on the 9th day of April, 1908, duly filed and properly recorded and indexed in Volume 2 of Chattel Mortgages in the office of the recorder of Fairbanks Precinct, Alaska, in which precinct said A. M. Ohlsen then resided and wherein said property was then situate; that at the time of the issuance of said writ of attachment said mortgage debt was due and unpaid; that before the marshal for said division [14] attempted to take the property covered by said mortgage and described in the complaint herein, he did not pay or tender to the said mortgagee nor to any assignee thereof the amount of said mortgage debt nor any part thereof, neither did he deposit the amount thereof nor any part thereof with the recorder of said precinct, nor did he at any subsequent time make such payment tender or deposit, wherefore his attempted levy upon said property was void, and the undertaking sued upon in this action was without consideration.

WHEREFORE defendants pray judgment that plaintiff take nothing by this action and that they recover their costs and disbursements herein.

A. R. HEILIG,
Atty. for Defendants.

Territory of Alaska,
Fourth Division,—ss.

F. S. Gordon, being duly sworn, deposes and says that he is one of the defendants above named; that the allegations contained in foregoing answer are true to the best of his knowledge, information and belief.

F. S. GORDON.

Subscribed and sworn to before me this 18th day of September, 1912.

[Seal] ALBERT R. HEILIG,
Notary Public, District of Alaska.

Received copy September 18, 1912.

LOUIS K. PRATT & SON,
Attys. for Pltff.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Sep. 19, 1912. C. C. Page, Clerk. By P. R. Wagner, Deputy. Pltff.'s Identification No. 1. May 2, 1919. #1624. J. E. Clark, Clerk. By Frank B. Hall, Deputy. No. 1624. Pl. Exhibit "G," Ross-Higgins Co., Plaintiff, vs. L. F. Protzman et al., Defendants. Filed in the District Court, Territory of Alaska, 4th Div. Feb. 26, 1920. H. Claude Kelly, Clerk. By John E. Pegues, Deputy. [15]

[Title of Court and Cause.]

Motion for Orders Respecting the Amended Complaint and Answer.

The plaintiff moves the Court for the following orders:

I.

For an order striking out all of paragraph I of plaintiff's amended complaint other than the following: "That at all times mentioned herein, it was a corporation duly organized and existing under and by virtue of the laws of the State of Oregon," for the reason that all other statements contained therein are redundant, irrelevant and immaterial.

II.

For an order striking from the answer what purports to be a denial of some of the allegations contained in the first paragraph of the amended complaint, for the reason that that part of the answer is redundant, irrelevant and immaterial.

III.

For an order striking from the answer that part purporting to be a denial of some of the allegations of the second paragraph of the amended complaint, for the reason that that portion of the answer is sham, frivolous and irrelevant and is a denial of matters the defendants are estopped from denying by reason of having signed the forthcoming bond which is the foundation of plaintiff's amended complaint.

IV.

For an order striking from the answer that part

found on page 1 thereof designated, "For a further defense and as a bar to this action defendants allege"; for the reason that the same is redundant, irrelevant and immaterial, and for the further reason that the defendants are estopped from relying upon the matters therein mentioned [16] as a bar to the plaintiff's action, by reason of the judgment in the said action No. 1095 therein referred to and the giving of the forthcoming bond, the foundation of plaintiff's cause of action set up in its amended complaint.

V.

For an order striking out that part of the answer found on page 1 thereof designated, "For a second and further defense to this action defendants allege"; for the reason that the same is sham, frivolous, irrelevant, immaterial and in flat contradiction of the allegations contained in the supposed further defense found in the answer on page 2.

VI.

For an order striking from the answer that part thereof found on page 2 and designated, "For a further defense to this action defendants allege"; for the reason that the same is sham, frivolous, immaterial, irrelevant and the defendants are estopped and precluded from raising the questions therein attempted to be raised, by reason of the execution of the forthcoming bond, the foundation of plaintiff's cause of action in its amended complaint, the execution of which is not denied by the defendants in their said answer.

The records and files in the action will be used in support of this motion.

LOUIS K. PRATT & SON,
Attorneys for Plaintiff.

Due service of the foregoing motion by receipt of copy thereof is hereby admitted this 3 day of Oct., A. D. 1912.

A. R. HEILIG,
Attorney for Defendants.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Oct. 3, 1912. C. C. Page, Clerk. By P. R. Wagner, Deputy. [17]

(Title of Court and Cause.)

Order on Motion for Orders Respecting Amended Complaint and Answer.

This cause came on to be heard by the Court in March, 1915, on plaintiff's motion as on file, to strike out portions of the answer, and was fully argued by Louis K. Pratt for plaintiff and A. R. Heilig for defendants, and the same was taken under advisement.

Now, at this time, to wit, September 7th, 1915, the Court being fully advised in the premises, it is ordered that the 1st, 2d, 3d, 4th and 5th requests for orders, contained in said motion be, and the same are, hereby denied, and that the 5th request made by said motion, i. e., to strike out the last defense contained in said answer and commencing at the top of page 2 thereof, be and the same is hereby sustained, and the said last described portion of the same is

stricken from the answer on the grounds set forth in said 6th request. Defendants may have ten days to file an amended answer, as they may be advised.

Dated this 7th day of September, A. D. 1915.

CHARLES E. BUNNELL,
District Judge.

Entered in Court Journal No. 13, page 212.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div., Sep. 7, 1915. J. E. Clark, Clerk. By Sidney Stewart, Deputy. [18]

(Title of Court and Cause.)

Amended Answer.

Come now the defendants and for their amended answer to the amended complaint herein—

Answering paragraph I they deny that the principal place of business of the plaintiff corporation was at any time in Skagway, Alaska, and deny that at any time other than on August 14, 1906, said corporation filed with the clerk of the District Court for the Third now Fourth, Division of Alaska, at Fairbanks, the annual statement required by section 658 of the Compiled Laws of Alaska.

Answering paragraph II they deny that on August 27, 1908, the marshal of said division levied a writ of attachment upon the stock, of merchandise and fixtures belonging to A. M. Ohlsen of the value of $1900, and itemized in said paragraph, or upon any part thereof, and deny that the articles mentioned in said

itemized list contained in said paragraph were worth on said date a greater sum than $1300.00.

Answering paragraph III they deny that the Court foreclosed plaintiff's alleged attachment lien upon the property in said complaint described.

They deny each and every allegation contained in paragraph IV.

For a further defense and as a bar to this action defendants allege—

That on the 18th day of July, 1906, and continuously thereafter the principal place of business in Alaska of said corporation was at Fairbanks, Alaska; that the object of action No. 1095 described in paragraph II of said complaint brought by plaintiff herein against A. M. Ohlsen, was to recover a debt due by said Ohlsen to [19] plaintiff for merchandise sold at Fairbanks, Alaska, by said plaintiff to said Ohlsen; that at no time did said plaintiff file in the office of the clerk of the district court for the Third, now Fourth, Judicial Division of Alaska, at Fairbanks, a duly authenticated copy, or any copy whatever, of its charter or articles of incorporation as required by law, and by reason of its failure so to do the contract sued upon in this action is void.

For a second and further defense to this action defendants allege:

That the property described in paragraph II of the complaint herein and for which the undertaking set out in said complaint was given, at the time of the attempted execution of the writ of attachment in said complaint described, did not belong to A. M. Ohlsen, or any part thereof.

For a further defense to this action defendants allege:

That at the time of the issuance of the writ of attachment described in said complaint and at the time of the attempted levy under said writ by said marshal upon the property described in said complaint, all the property described in paragraph II thereof was subject to the lien of a mortgage given by the said A. M. Ohlsen to the said Peter Vachon, both named in said complaint, on the 8th day of April, 1908, to secure the payment by the said Ohlsen to the said Vachon of $500 on May 15, 1908, $1500 on June 1, 1908, $500 on June 15, 1908, $500 on July 1, 1908, $425 on July 15, 1908, and $427.07 on August 1, 1908, in which amounts said Ohlsen was then indebted to said Vachon, which mortgage was duly executed and acknowledged on the 8th day of April, 1908, by said A. M. Ohlsen, and on the same day said A. M. Ohlsen and said Peter Vachon each made affidavit thereto and thereon to the effect that said mortgage was made in good faith to secure the amount named therein, being the several sums above named, and without any design to hinder, delay or defraud creditors, and was [20] on the 9th day of April, 1908, duly filed and properly recorded an indexed in Volume 2 of Chattel Mortgages in the office of the Recorder for Fairbanks Precinct, Alaska, in which precinct said Ohlsen then resided and wherein said property was then situate; that at the time of the issuance of said writ of attachment and at the time of the attempted levy under said writ by said marshal upon the property described

in said complaint and in said mortgage said mortgage debt and the whole thereof was due and unpaid, excepting $603.92; that prior to the time of the attempted levy by said marshal of said writ of attachment upon the property described in said complaint and in said mortgage, all of said property had been delivered by the said Ohlsen to the said Vachon and was at and prior to said attempted levy in the possession of said Vachon as mortgagee; that said marshal had actual knowledge of all the facts in this paragraph hereinbefore stated at the time he made said attempted levy upon said property under said writ of attachment; that before said marshal attempted to take the property covered by said mortgage and described in the complaint herein under said writ of attachment he did not pay or tender to the said mortgagee nor to any assignee thereof the amount of said mortgage debt nor any part thereof, neither did he deposit the amount thereof nor any part thereof with the recorder of said precinct, nor did he at any subsequent time make such payment tender or deposit; that although all the property described in said complaint and in said mortgage has been sold, by said mortgagee with the consent of the mortgagor under a power contained in said mortgage, and the proceeds and value thereof applied upon account of said mortgage debt, a large part of said mortgage debt still remains unpaid; that notwithstanding his knowledge of the facts hereinbefore set forth the said marshal persisted in his attempt to levy upon and take possession of the property described in said complaint and in said mortgage, and as a condition

for desisting from such attempt exacted from the said Vachon the bond sued upon in this action, whereupon the said Vachon for the purpose of retaining [21] his lawful possession of said property caused to be given to said marshal the bond sued upon in this action; that by reason of the premises the attempted levy upon said property by said marshal was void, and the undertaking sued upon in this action was unlawfully exacted by said marshal, and was and is null and void and without consideration.

WHEREFORE defendants pray judgment that plaintiff take nothing by this action and that they recover their costs and disbursements herein.

A. R. HEILIG,
Atty. for Defts.

Territory of Alaska,
Fourth Division,—ss.

L. F. Protzman, being duly sworn, deposes and says that he is one of the defendants in above-entitled action; that he has read foregoing amended answer and that the allegations therein contained are true as he believes.

L. F. PROTZMAN.

Subscribed and sworn to before me this 17th day of September, 1915.

[Seal] ALBERT R. HEILIG,
Notary Public, Territory of Alaska.

My commission expires June 18, 1917.

Received copy Sep. 17, 1915.

LOUIS K. PRATT & SON,
Attys. for Pltffs.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Sep. 17, 1915. J. E. Clark, Clerk. By L. F. Protzman, Deputy. [22]

[Title of Court and Cause.]

Motion for Orders Affecting Amended Answer.

The plaintiff moves the Court for the following orders directed against the amended answer herein:

1st. For an order striking from the said amended answer that part thereof found on page 1 and designated, "For a further defense and as a bar to this action defendants allege," for the reason that the allegations thereof are irrelevant, and immaterial as a defense to this action and could only have been material, if at all, in the original action No. 1095, entitled "The Ross-Higgins Company, a Corporation, Plaintiff, vs. Alfred M. Ohlsen, Defendant," the present action being one as assignee of a forthcoming bond acquired by plaintiff after it has ceased to do a mercantile business in Alaska and not connected therewith, and further, because the said supposed defense is argumentative and based upon a mere conclusion.

2d. For an order requiring the defendants to make that part of their amended answer found near the bottom of page 1 and designated, "For a second and further defense to this action defendants allege," more definite and certain, by setting out the name of the person or persons, firm or corporation, owning the attached property at the time of the levy thereof.

3d. For an order striking from the said amended answer that part thereof found on page 2 and designated, "For a further defense to this action defendants allege," for the reason that the same matter inserted in the original answer was stricken out by the Court on motion of plaintiff, as sham, frivolous, immaterial, irrelevant, and because defendants were estopped from raising the questions therein attempted to be raised by that part of the supposed answer, on which ruling said defendants were given to and until September [23] 17, 1915, to amend the same, and for the reason that the part of the amended answer above described is sham, irrelevant, immaterial, and defendants are estopped and precluded from raising the questions therein attempted to be raised, by reason of the execution of the forthcoming bond, the foundation of plaintiff's cause of action in its amended complaint, the execution of which is not denied by defendants in their said amended answer.

LOUIS K. PRATT & SON,
Attorneys for Plaintiff.

Service of foregoing motion, by copy thereof, acknowledged this 20th day of September, 1915.

A. R. HEILIG,
Attorney for Defts.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Sept. 20, 1915. J. E. Clark, Clerk. By L. F. Protzman, Deputy. [24]

[Title of Court and Cause.]

General March, 1915, Term—One Hundred and Ninth Court Day.

Adjourned Session—October 11th, 1915.

Order Denying Motion Affecting Amended Answer.

Now, on this day, Louis K. Pratt appearing for and in behalf of plaintiffs and A. R. Heilig appearing for and on behalf of defendants, plaintiff's motion for order affecting amended answer having previously been taken under advisement by the Court,—

It is now ORDERED that plaintiff's motion for order affecting amended answer be, and the same is, hereby denied, and plaintiffs may have twenty days in which to plead further.

CHARLES E. BUNNELL,
District Judge.

Entered in Court Journal No. 13, page 282. [25]

[Title of Court and Cause.]

Demurrer to Affirmative Defenses in Amended Answer.

The plaintiff demurs to that part of the amended answer found on page 1 thereof and designated, "For a further defense and as a bar to this action defendants allege," for the reason that the allegations and statements therein made are insufficient

in law to constitute a defense to plaintiff's amended complaint herein.

Plaintiff demurs to that part of the amended answer found near the bottom of page 1 thereof and called "For a second and further defense to this action defendants allege," upon the ground that the matters and things therein stated are insufficient as a matter of law to constitute any defense to plaintiff's amended complaint.

Plaintiff demurs to that part of defendants' amended answer found on page 2 thereof and headed, "For a further defense to this action defendants allege," because the allegations and statements contained in the said last mentioned supposed defense are insufficient to constitute any defense to the allegations of plaintiff's amended complaint.

LOUIS K. PRATT & SON,
Attorneys for Plaintiff.

Service of the foregoing Demurrer, by copy thereof, acknowledged this 11th day of November, 1915.

A. R. HEILIG,
Attorney for Defendants.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Nov. 11, 1915. J. E. Clark, Clerk. By Sidney Stewart, Deputy. [26]

General March, 1917, Term—Eighty-second Court Day.

Wednesday, October 10th, 1917.

[Title of Court and Cause.]

Order Overruling Demurrer to Affirmative Defenses.

Now, on this day, this cause having been heretofore heard by the Court upon the demurrer of the plaintiff, and the Court having taken the matter under advisement and reserved decision thereon and being fully and duly advised in the premises,—

It is ordered that the said demurrer be, and is hereby, overruled, and the plaintiff be allowed ten days in which to reply.

Entered in Court Journal No. 14, page 132.

CHARLES E. BUNNELL,
District Judge. [27]

[Title of Court and Cause.]

Reply to New Matter in Amended Answer.

I.

For a reply to the supposed first affirmative defense, found on page 1 of the amended answer, and designated, "For a further defense and as a bar to the action," etc., plaintiff says: That it denies that on July 18, 1916, or continuously thereafter, or at any other time, its principal place of business was at Fairbanks, Alaska.

Replying to that part of the supposed amended

answer found near the bottom of page 1 and called, "For a second and further defense to the action," etc., plaintiff alleges that it denies that the property taken under the writ of attachment and described in the second paragraph of the amended complaint belonged to some person other than A. M. Ohlsen, but, on the contrary, plaintiff alleges that said personal property, at the time of such levy, was owned by the said A. M. Ohlsen.

For a reply to that part of the supposed amended answer found on page 2 thereof and headed, "For a further defense to this action," etc., plaintiff says that it denies that at the time of the levy of the attachment on the personal property described in paragraph 2 of the amended complaint, said property was subject to a or any lien of a chattel mortgage given on said property prior to such levy, by A. M. Ohlsen to Peter Vachon, and plaintiff further denies that at any time prior to such levy, the said A. M. Ohlsen delivered possession of said personal property to said Peter Vachon; denies that said Vachon had possession of said attached property or any part thereof at any [28] time prior to such levy; denies that plaintiff forced the said Vachon to give the forthcoming bond made the basis of this action, but, on the contrary, alleges that the same was executed freely and voluntarily by the defendants to effect the release of said personal property from the possession of the marshal.

For a reply of new matter as a defense to the statements found in that part of the amended answer, found on page 2 thereof and designated therein,

"For a further defense to this action," etc., plaintiff alleges:

That the pretended chattel mortgage dated April 8, 1908, given by A. H. Ohlsen to Peter Vachon and fully described in said "further defense," purported to be a chattel mortgage on property described as "two log buildings situate on Little Eldorado Creek, in the Fairbanks Precinct, Territory of Alaska, and on all goods, wares, merchandise, store fixtures, mining tools and implements now contained and being in said buildings, save and except a line of goods purchased from Sargent & Pinsky, which consists of miners' wearing apparel," the said property being all the property then owned and possessed by said A. M. Ohlsen; that a part of the merchandise therein described was afterwards seized under the writ of attachment in case No. 1095, which action and the property taken under said attachment are fully described in paragraph 2 of the amended complaint; that by the terms of said pretended chattel mortgage, the said Ohlsen was to remain in possession of the stock of goods, wares and merchandise referred to therein, sell the same in the usual course of trade, and replenish the stock with new goods from time to time, such new goods to be paid for by said Ohlsen out of the proceeds of sales of the goods, or were to be supplied by said Peter Vachon, and such new goods, when purchased, to be mingled with the old stock and to be subject to the pretended lien of said mortgage; but plaintiff avers that the description of the mortgaged property contained in such pretended chattel mortgage was not

sufficiently definite to enable a third person to identify the same therefrom; that after the date of said pretended chattel mortgage and up to the time of the levy of said writ of attachment on August 27th, 1908, the said A. M. Ohlsen continued in the possession of said personal property, sold the [28A] same in the usual course of mercantile business, and from time to time bought new goods and paid therefor from the proceeds of sales of the goods described in said pretended chattel mortgage, and mingled said new goods indiscriminately with said old stock; that by the express terms of said pretended chattel mortgage the same was made to secure a debt of $3,852.07 due from said A. M. Ohlsen to Peter Vachon and a debt of $1,350.00 due from said Ohlsen to R. H. Miller & Co., of Chena, Alaska, and it was provided therein that payments out of the proceeds of sales of goods were to be made by said Ohlsen to Peter Vachon, and by him credited and paid out *pro rata* to himself and said R. H. Miller & Co.; that said pretended chattel mortgage was executed by the parties thereto for the purpose and with the effect of withdrawing the property of said A. M. Ohlsen from the reach of his creditors, of whom plaintiff was one, and was made with the intent to hinder, delay, and defraud the creditors of said A. M. Ohlsen in this: That it gave an unlawful preference to two of the creditors of said Ohlsen, viz.: Peter Vachon and R. H. Miller & Co.; that by reason of the premises said pretended chattel mortgage was and is void; that the A. M. Ohlsen referred to in said amended answer and the Alfred M. Ohlsen men-

tioned in the amended complaint is one and the same person.

For a second defense of new matter by way of reply to that part of the amended answer on page 2 and designated, "For a further defense to this action," etc., plaintiff says: That the undertaking referred to therein was freely and voluntarily executed by defendants for the purpose of securing the release of possession by the marshal of said division of the stock of goods attached in case No. 1095, entitled The Ross-Higgins Co. vs. Alfred M. Ohlsen, and described in paragraph 2 of the amended complaint; that such purpose was accomplished thereby, and the said attached goods were turned over by said marshal to Peter Vachon, the claimant; that neither said Vachon nor these defendants appeared in said cause No. 1095 and none of them made any objections therein to the regularity or legality of the said writ of attachment nor the levy thereof, nor did either or any of them in said action make any claim in any manner that said A. M. Ohlsen was not the [29] owner of said attached property, but, on the contrary, by the execution of such forthcoming bond and by such failure to appear and litigate those questions in said cause No. 1095 defendants and said Peter Vachon waived all objections to the regularity and legality of said writ and the levy thereof and the ownership of the said attached property, and by such failure to appear in said action No. 1095 conceded and acknowledged the regularity and legality of the writ of attachment and the levy thereof, and that the ownership of the attached property was

in the said A. M. Ohlsen; that these defendants are estopped in this action to raise or litigate any of the questions above referred to; that the A. M. Ohlsen mentioned in said supposed third defense of the amended answer is the same person who is named in the amended complaint as Alfred M. Ohlsen.

WHEREFORE, plaintiff prays judgment as in its amended complaint.

LOUIS K. PRATT,
Attorney for Plaintiff.

United States of America,
Territory of Alaska,—ss.

Louis K. Pratt on oath says: That he is the attorney for plaintiff herein, a foreign corporation; that this action is based on the forthcoming bond given by the defendants in connection with attachment proceedings in the case No. 1095 on the records of this court entitled: "The Ross-Higgins Company, a corporation, plaintiff, against Alfred M. Ohlsen, doing business in the name of the Fox Trading Company, defendant," in which last-mentioned case affiant was attorney for the plaintiff therein; that the bond in this action provides for the delivery of attached property or the direct payment of the value of the said property in money, which said bond is now in the files of said court in the said cause No. 1095; that he has read the foregoing reply and knows the contents thereof, and the same are true as he verily believes.

LOUIS K. PRATT.

Subscribed and sworn to before me this 25th day of October, 1917. [30]

[Seal] L. R. GILLETTE,
Notary Public, Territory of Alaska.

My commission expires Aug. 3, 1921.

Due service of the foregoing reply by copy thereof acknowledged this 26th day of October, 1917.

A. R. HEILIG,
Attorney for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Oct. 26, 1917. J. E. Clark, Clerk. By Frank B. Hall, Deputy. [31]

[Title of Court and Cause.]

General March, 1919, Term—Thirty-second Court Day.

Thursday, May 1, 1919.

Trial by the Court.

Now, on this day, this cause came on regularly for trial before the Court, respective counsel having stipulated to waive trial by jury, Louis K. Pratt appearing as counsel for the plaintiff, and A. R. Heilig appearing as counsel for the defendants, and both sides announcing themselves ready for trial, the following proceedings were had, to wit:

Opening statement was made by Louis K. Pratt, counsel for plaintiff.

Statement was made by A. R. Heilig, counsel for defendants.

Upon motion of counsel for defendants, the defendants are permitted to amend the third further defense in the amended answer by adding the words and figures "excepting $603.92" after the word "unpaid" in the 24th line thereof.

Plaintiff's Exhibits "A" (judgment-roll in cause No. 1095), "B" (writ of attachment and return in No. 1095), "C" (certified copy of articles of incorporation), "D" (certified copy annual statements), and "E" (certified copy of articles of incorporation, etc.,) were each duly offered, marked, and admitted in evidence.

At 11:40 A. M., Court declared recess until 2 P. M.

2 P. M.

And now respective counsel being present as heretofore, the trial of said cause was resumed. [32]

Alfred M. Ohlsen and Frank B. Hall were each duly sworn in the order named and testified in behalf of the plaintiff.

Plaintiff rests.

Frank B. Hall was recalled to the stand and testified in behalf of the defendants.

Defendants' Exhibit No. 1 (annual statement) was duly offered, marked, and admitted in evidence.

Peter Vachon was duly sworn and testified in behalf of the defendants.

Defendants' Identification No. 1 (certified copy of mortgage) was duly marked therefor.

At 3:55 P. M., Court declares recess until 4:10 P. M.

4:10 P. M.

And now, respective counsel being present as heretofore, the trial of said cause was resumed.

Peter Vachon resumed the stand and testified further in behalf of the defendants.

At 5:P. M. Court adjourned until 10:A.M, Friday, May 2, 1919.

CHARLES E. BUNNELL,
District Judge. [33]

[Title of Court and Cause.]

General March, 1919, Term—Thirty-third Court Day.

Friday, May 2, 1919.

Trial (Continued).

Now, on this day, this cause came on again regularly for trial before the Court, and respective counsel being present as heretofore, the trial of cause was resumed.

Peter Vachon resumed the stand and testified further in behalf of the defendants.

Alfred M. Ohlsen was recalled to the stand and testified in behalf of the defendants.

At 10:50 A. M., Court declares recess until 2:00 P. M.

2:00 P. M.

And now respective counsel being present as heretofore, the trial of said cause was resumed.

Peter Vachon was recalled to the stand and testified further in behalf of the defendants.

Defendants' Identifications No. 2 (letter) and No. 3 (letter) were each duly marked therefor.

L. B. Clough was duly sworn and testified in behalf of the defendants.

Peter Vachon was recalled to the stand and testified further in behalf of the defendants.

Defendants rest.

F. C. Wiseman was duly sworn and testified in behalf of the plaintiff in rebuttal.

Defendants' Identification No. 4 (certified copy of writ [34] of attachment) was duly marked therefor.

M. O. Carlson was duly sworn and testified in behalf of the plaintiff in rebuttal.

Plaintiff's Exhibit "F" (certified copy of affidavit for renewal of chattel mortgage) was duly offered, marked, and admitted in evidence.

Plaintiff's Identification No. 1 (original answer in cause No. 1624) was duly marked therefor.

Plaintiff rests.

Defendants rest.

At 3:15 P. M., the trial of this cause was continued until 2:00 P. M., Tuesday, May 6, 1919.

CHARLES E. BUNNELL,
District Judge. [35]

[Title of Court and Cause.]

General March, 1919, Term—Thirty-fifth Court Day.

Tuesday, May 6, 1919.

Trial (Continued).

Now, on this day, this cause came on again regularly for trial, Louis K. Pratt appearing on behalf of the plaintiff, and A. R. Heilig appearing on behalf of the defendants, and the trial of said cause was resumed.

Argument at this time to the Court was waived by Louis K. Pratt, counsel for plaintiff.

Argument was had by A. R. Heilig, counsel for defendants.

At 5:00 o'clock P. M., the trial of this cause was continued until 10:00 A. M., Wednesday, May 7, 1919.

CHARLES E. BUNNELL,
District Judge. [36]

[Title of Court and Cause.]

General March, 1919, Term—Thirty-sixth Court Day.

Wednesday, May 7, 1919.

Trial (Continued).

Now, on this day, this cause came on again regularly for trial, and respective counsel being present as heretofore, the trial of said cause was resumed.

Argument was contained by A. R. Heilig, counsel for defendants.

Argument was had by Louis K. Pratt, counsel for plaintiff.

At 11:30 A. M., Court declared recess until 2:00 P. M.

2:00 P. M.

And now respective counsel being present as heretofore, the trial of said cause was resumed.

Argument was continued by Louis K. Pratt, counsel for plaintiff.

At 3:50 P. M., Court declared recess until 4:00 P. M.

4:00 P. M.

And now respective counsel being present as heretofore, the trial of said cause was resumed.

Argument was continued by Louis K. Pratt, attorney for plaintiff.

Whereupon the Court took the matter under advisement and reserved decision.

CHARLES E. BUNNELL,
District Judge. [37]

[Title of Court and Cause.]

General March, 1919, Term—Seventy-third Court Day.

Thursday, February 26, 1920.

Decision.

This cause having heretofore been heard and the Court having taken the matter under advisement

and reserved its decision and rulings as to the admission of certain evidence, now, at this day, the plaintiff appearing by Louis K. Pratt, its attorney, and the defendants appearing by A. R. Heilig, their attorney, the Court admits in evidence and orders filed as Plaintiff's Exhibit "G," the document heretofore offered herein as Plaintiff's Identification No. 1, and admits in evidence and orders filed as Defendants' Exhibits No. 2 to No. 5, respectively, the documents heretofore offered herein as Defendant's Identifications No. 1 to 4. Thereupon the Court filed its written decision herein and directed that counsel prepare findings of fact and conclusions of law and judgment in accordance therewith.

CHARLES E. BUNNELL,
District Judge. [38]

[Title of Court and Cause.]

Decision.

The plaintiff, an Oregon corporation, seeks to recover from the defendants the sum of $1,404.85, together with interest thereon at the rate of 8% per annum from January 9, 1911. The complaint was filed April 17, 1911. By its amended complaint the plaintiff alleges its corporate existence and a compliance with specific acts upon its part under the provisions of the Compiled Laws of Alaska to give the Court jurisdiction. The plaintiff further pleads that in action Number 1095 in this Court wherein the said corporation was plaintiff and one Alfred M. Ohlsen, doing business in the name of

The Fox Trading Company, was defendant, plaintiff attached a stock of merchandise and fixtures belonging to the said Ohlsen of the value of $1900, which said merchandise and fixtures having been claimed by one Pete Vachon, the defendants herein, Protzman and Gordon, executed to the United States Marshal, H. K. Love, a redelivery or forthcoming bond to procure the release of said attached property, engaging "to redeliver the said attached property or pay the value thereof to the United States Marshal to whom execution upon a judgemnt obtained by plaintiff in said action may be issued"; that the plaintiff obtained judgment in cause No. 1095 on January 9, 1911, in the sum of $1,404.85 and a decree foreclosing the plaintiff's attachment lien upon the property described and ordering the same sold to satisfy the judgment; that special execution duly isued, was returned wholly unsatisfied; and that said bond was assigned by the said H. K. Love to plaintiff herein.

The defendants answering deny the allegations of the complaint [39] conferring jurisdiction, the levy of the writ of attachment, the foreclosure of the attachment lien, and that the value of the stock of merchandise and fixtures was of a greater sum than $1300. Affirmatively the defendants plead:

> "That on the 18th day of July, 1906 and continuously thereafter, the principal place of business in Alaska of said corporation was at Fairbanks, Alaska; that the object of action No. 1095 described in paragraph II of said complaint, brought by plaintiff herein against A. M. Ohlsen, was to recover a debt due by said

Ohlsen to plaintiff for merchandise sold at Fairbanks, Alaska, by said plaintiff to said Ohlsen; that at no time did plaintiff file in the office of the Clerk of the District Court for the Third, now Fourth Judicial Division of Alaska, at Fairbanks, a duly authenticated copy, or any copy whatever, of its charter or articles of incorporation as required by law, and by reason of its failure so to do the contract sued upon in this action is void."

That at the time of the attempted execution of the writ of attachment the property described did not belong to A. M. Ohlsen.

That said property at the time of the issuance of the writ of attachment and attempted levy was subject to the lien of a chattel mortgage given by the said Ohlsen to Peter Vachon, and that the United States Marshal, though having actual knowledge of the facts, failed to comply with the provisions of the law relative to attaching mortgaged personal property.

Issue having been joined the case was tried to the Court without a jury.

Concerning the facts there is little dispute. The plaintiff is a foreign corporation organized under the laws of Oregon. March 2, 1901, it filed with the Secretary of Alaska a certified copy of its articles of incorporation, together with financial statement, designation and consent of agent as required under the provisions of chapter 23, Title III, Civil Code of Alaska (sec. 654, Compiled Laws of Alaska). It also filed with the Secretary of Alaska annual

statements for the years 1903, 1904, 1905, and 1906. It filed with the clerk of the court for the Frist Judicial Division at Juneau, September 28, 1900, a certified copy of its articles of incorporation, together with financial statement, designation and consent of agent. Its annual statements for the years 1903, 1904, and 1905, filed with the clerk of the court at Juneau designate Skagway in the First Judicial Division as its principal [40] place of business in the Territory. It did business at Fairbanks, Alaska, during the year 1906 and for a part of the year 1907, and in its annual statement for the year 1906 filed with the clerk of the court for the Third (now Fourth) Judicial Division, it designates Fairbanks as its principal place of business in the Third Judicial Division. It did not file with the clerk of the court for the Third Judicial Division a certified copy of its articles of incorporation or any other statement required by law except its annual statement for the year 1906. It closed its business at Fairbanks in September, 1907.

August 20, 1908, the plaintiff brought an action for debt, No. 1095, in this court against Alfred M. Ohlsen, doing business in the name of the Fox Trading Company. Issue was joined and such proceedings were had that on January 9, 1911, judgment was rendered for the plaintiff in the sum of $1,367.50 and costs amounting to $37.35. A writ of attachment having issued, the United States Marshal on August 27, 1908, levied upon a stock of merchandise and fixtures and two log cabins, personal property of the defendant. Omitting the cap-

tion, lists of property, and statement concerning debts attached, the Marshal's return is as follows:

> "I hereby certify that I received the within writ of attachment on the 26th day of August, A. D. 1908, and executed the same at Little Eldorado Creek, Alaska, on the 27th day of August, A. D. 1908, by attaching all of the within defendant's right, title and interest in and to, those two log cabins on 3 above, creek claim, Little Eldorado Creek, Alaska, used by the Fox Trad. Co., and the stick of merchandise in said cabins and warehouse on said claim, a list of the same is hereon attached and made part of this return, by leaving a certified copy of this writ, together with a notice specifying the property attached with the within defendant Alfred M. Ohlsen and by taking possession of the said stock of merchandise, the same not being moved, nor a keeper put in charge of said merchandise by instructions of the plaintiff's attorney.
>
> Dated at Dome, Alaska, this 27th day of August, A. D. 1908.
>
> GEO. G. PERRY,
> U. S. Marshal,
> F. C. WISEMAN,
> Deputy."

The defendants herein executed on September 6, 1908, the following bond, with usual affidavit of justification:

> "Whereas the above-named plaintiff commenced an action in the District Court for the

Territory of Alaska, Third Division, against the above-named defendant, claiming that there was due to said plaintiff from said defendant the sum of fifteen hundred [41] eighty-nine dollars and seventy-two cents, together with eight per cent per annum interest from January 1, 1908, and thereupon an attachment issued against the property of the defendant as security for the satisfaction of any judgment that may be recovered therein and certain property and effects claim to be the property of the said defendant has been attached and seized by the United States Marshal for the Third Division of the Territory of Alaska, under and by virtue of the said writ; and

Whereas Peter Vachon, at the time and before the commencement of this suit, and at the time and before the levy of said writ, had a chattel mortgage upon all of said property so attached, which said mortgage is dated the 8th day of April, 1908, and made by A. M. Ohlsen to Peter Vachon, which said mortgage was recorded on the 9th day of April, 1908, at 20 minutes past 12 noon, and recorded in Vol. 2 of Chattel Mortgages in the office of the Recorder of the Fairbanks Recording District, Territory of Alaska, and which said mortgage and the amount due thereon and secured thereby has not been paid, nor any portion thereof, and the said mortgage at the time of the commencement of said action and the issuance of said writ and the levy upon said property was in full force

and effect and is now in full force and effect, and the said Peter Vachon is the owner and holder of the note secured by said mortgage, and the owner of said mortgage, and was at the time of the commencement of said action and issuance of said writ and the levy upon said property, and claims the said property by virtue of said chattel mortgage.

Now, therefore, we, the undersigned, residents of the Territory of Alaska, in consideration of the premises and in consideration of the delivery of the said property to the said Peter Vachon do hereby jointly and severally undertake in the sum of two thousand dollars and promise and engage to redeliver the said property or pay the value thereof to the said United States Marshal to whom execution upon a judgment obtained by plaintiff in said action may be issued.

L. F. PROTZMAN. (Seal)
F. S. GORDON. (Seal)

Witnesses:

W. F. WHITELY.
J. S. STERLING.

April 8, 1908, the said Alfred M. Ohlsen duly made and executed to Peter Vachon a chattel mortgage to secure the payment of certain notes therein set forth and amounting to the sum of $3,852.04 upon the following described personal property:

"One log building, 20x21 feet; one log building 20x17 feet adjoining and used as a store; and warehouse 12x16 feet, frame with tar-paper

roof, together with the land occupied with the same and a reasonable space around them for the convenient use and occupation thereof, which said buildings are situate upon creek claim number three above discovery on Little Eldorado Creek, in the Fairbanks Recording District, Territory of Alaska; the said buildings now being actually used by the party of the first part in the carrying on of his said business.

Also, all goods, wares, merchandise, store fixtures, mining tools and implements now contained and being in said buildings, safe and except a line of goods purchased from Sargent and Pinska which cossists of miner's wearing apparel."

Renewal affidavit was filed with the commissioner for the Precinct on March 20, 1909.

By the terms of the mortgage the mortgagor was to remain in [42] possession of the aforesaid chattels, continue his mercantile business, replenish his stock from time to time and after deducting the expense incident to maintaining the business account to the mortgagee for the proceeds. The mortgage also contains the provision:

"It is further mutually understood and agreed between the parties hereto that, whereas the party of the first part is indebted to R. H. Miller & Co., of Chena, Alaska, in the sum of Thirteen Hundred and Fifty Dollars for goods, wares, and merchandise sold by the said R. H. Miller & Co. to the party of the first part; and

Whereas it has been agreed that the said

R. H. Miller & Co. is to share *pro rata,* according to their respective claims, with the party of the second part in the net proceeds realized from the sale of the goods as hereinbefore provided;

Now, therefore, it is agreed between the party of the first part and the party of the second part, that the party of the second part is to turn over of moneys received by him from the sale of goods, as heretofore provided, to R. H. Miller & Co. that proportion of the net proceeds as the claims of the said R. H. Miller and the party of the second part shall bear to each other."

The instrument was acknowledged by the mortgagor and both the mortgagor and mortgagee made affidavit of good faith as required by law. I find the value of the chattels attached to be the sum of $1,900. The defendants Protzman and Gordon I find to be privies of Vachon and not of Ohlsen as contended by plaintiff.

Under the act of June 6, 1900, 31 Stat. L. 528–529, Congress enacted a law for the Territory on the subject of foreign corporations. Section 654 provides:

"Sec. 654. All corporations or joint stock companies organized under the laws of the United States, or the laws of any State or Territory of the United States, shall, before doing business within the District, file in the office of the Secretary of the District and in the office of the clerk of the District Court for the division wherein they intend to carry on busi-

ness, a duly authenticated copy of their charter or articles of incorporation, and also a statement, verified by the oath of the president and secretary of such corporation, and attested by a majority of its board of directors, showing—

(1) The name of such corporation and the location of its principal office or place of business without the District; and, if it is to have any place of business or principal office within the District, the location thereof;

(2) The amount of capital stock;

(3) The amount of its capital stock actually paid in money;

(4) The amount of its capital stock paid in in any other way, and in what;

(5) The amount of the assets of the corporation, and of what the assets consist, with the actual cash value thereof;

(6) The liabilities of such corporation, and if any of its indebtedness is secured, how secured, and upon what property. [43]

Such corporation or joint stock company shall also file, at the same time and in the same offices, a certificate, under the seal of the corporation and the signature of its president, vice-president, or other acting head, and its secretary, if there be one, certifying that the corporation has consented to be sued in the Courts of the District upon all causes of action arising against it in the District, and that service of process may be made upon some person, a resident of the District, whose name and place of

residence shall be designated in such certificate, and such service, when so made upon such agent, shall be valid service on the corporation or company, and such agent shall reside at the principal place of business of such corporation or company in the District."

Section 655 provides for the filing of the written consent of the agent designated. Section 656 has to to with filling a vacancy in the office of agent.

Section 657: "If any such corporation or company shall attempt or commence to do business in the District without having first filed said statements, certificates, and consents required by this chapter, it shall forfeit the sum of twenty-five dollars for every day it shall so neglect to file the same; and every contract made by such corporation, or any agent or agents thereof, during the time it shall so neglect to file such statements, certificates, or consents, shall be voidable at the election of the other party thereto. It shall be the duty of the United States attorney for the District to sue for and recover, in the name of the United States, the penalty above provided, and the same, when so recovered, shall be paid into the Treasury of the United States."

Section 658. "Every such corporation or company shall annually, and within thirty days from the first day of July of each year, make a report, which shall be in the same form and contain the same information as required in the statement mentioned in section six hundred and

fifty-four of this chapter, which report shall be filed in the office of the Secretary of the District, and a duplicate thereof in the office of the Clerk of the District Court for the Division wherein the business of the corporation is carried on."

Section 659 gives existing corporations ninety days within which to comply with the law.

Section 660: "If any such corporation or company shall fail to comply with any of the provisions of this chapter, all its contracts with citizens of the District shall be void as to the corporation or company and no Court of the District, or of the United States, shall enforce the same in favor of the corporation or company so failing."

An application of the law to the facts in this case obviously depends upon the correct interpretation of sections 657 and 660 above quoted. Under statutes of similar purport the authorities are in hopeless conflict. It is not because the statutes are in ambiguous phraseology or because their purpose can not be readily understood, but because one's sense of justice is challenged by the proposition [44] that a debtor can avoid payment of a just debt because his creditor, a foreign corporation, has failed to comply with the law and therefore is not permitted to maintain an action in the Courts to collect the same. Mr. Thompson, the author of the subject entitled, "Foreign Corporations," in 19 Cyc. 1298, speaks of the "shocking immorality" of such a proposition. The purpose of the law is not to

relieve a debtor from the payment of his just debt, but in furtherance of public policy to compel the unknown artificial person to disclose its identity, to the end that the citizens of the State may know its financial status and under what laws it is organized. For the State to require less would be to require nothing at all.

The statute in question is clear, plain, unambiguous and unequivocal. "Voidable" in section 657 does not make "void" in section 660 mean "voidable," nor does "void" in section 660 make "voidable" in section 657 mean "void." Section 657 has first of all to do with the matter of penalty for a failure to comply with the law. Incidentally, it says that during the time a foreign corporation shall neglect to file the required statements, its contracts shall be voidable at the election of the other party thereto. Voidable means capable of being avoided or of being adjudged void. As between the parties then, the foreign corporation not having complied with the law is not permitted to maintain that the contract is valid if the other party elects to claim it is voidable. As long as the other party treats the contract as valid, the corporation can receive and retain the fruits thereof, and the other party obviously cannot, in the case of a payment on account, recover any such payment by an action in Court, for it has at its election treated the contract as valid. Section 660 logically follows the provisions of section 657, for if the foreign corporation by failure to comply with the law is in the position that it has made a contract with another party and

said other party can at its election declare the contract void, of what purpose would it be to permit the foreign corporation to maintain an action in court? True, upon action being brought, the other party might come into court and elect to declare the contract valid, but that is simply to indulge in speculation. [45] The statute says to the foreign corporation that so far as judicial inquiry is concerned when it is shown that it has not complied with the law its contracts shall be void, and that no court of the District or of the United States shall enforce the same in favor of the corporation or company so failing. It is a positive mandatory inhibition and under a fair interpretation of the law is incapable of any other construction.

It is argued that the business conducted at Fairbanks was a branch of the Skagway business. The annual statement for the year 1906, which by the way was not filed with the clerk of the court until August 14, 1906, more than thirty days after the 1st of July, designates Fairbanks as its principal place of business in the Territory. But whether or not it is a branch store is immaterial, for it was doing business in the Third Judicial Division and had not complied with the law with reference thereto. Also it did not file any annual statement for the year 1907, though the record shows it was in business in said Division more than thirty days after July 1st of said year.

The tendency of practically all recent decisions is to require foreign corporations to comply with the plain provisions of the law. A compliance with the

law by a foreign corporation is a condition precedent to the right to do business in another state. If it fails to comply with the law, then in furtherance of public policy it may not maintain an action to enforce its contracts.

Cyclone Mining Co. vs. Baker L. & P. Co., 165 Fed. 996.

La Moine Lumber & Trad. Co. vs. Kesterson et al., affirmed in 193 Fed. 355, 171 Fed. 980.

National Mercantile Co. vs. Watson Corp. Comr. et al., 215 Fed. 929.

Empire M. & M. Co. vs. Tombstone M. & M. Co., 100 Fed. 910.

Hammer vs. Garfield Mining Co., 130 U. S. 297.

Bradford Co. vs. Dunn, 176 N. Y. S. 834.

Amos D. Bridges Sons, Inc., vs. State, 177 N. Y. S. 3.

Republic Rubber Co. vs. Adams, 213 S. W. 80.

Hayes vs. West Virg. Oil, Gas & By. Prod. Co., 210 S. W. 174, 12 R. C. L., page 81.

Phoenix Nursery Co. vs. Trostel, 164 N. W. 995.

It necessarily follows that the judgment in No. 1095 was void and all proceedings had by virtue of attempts to attach the defendant's [46] property were likewise void. The question was properly raised by the pleading.

At page 575, Volume I of Shinn on Attachment, the author says:

"But the jurisdiction of the Court in making such attachment may be denied by the obligors under proper pleading in an action on the bond given for the release of the attached property, brought after judgment against the defendant in the attachment suit."

Likewise, in 2 R. C. L., page 890, it is stated:

"In some cases, however, it has been held that the obligors are not precluded from attacking the attachment proceedings in the case wherein the attachment issued, and the obligors are entitled to show that the attachment proceedings are wholly void because of fraud, collusion, or the like." Citing: 32 L. R. A. (N. S.) 404–407, 29 Pac. 851.

In 6 C. J. 353 it is stated:

"Objections on behalf of the surety on a bond to release attached property, which go to the jurisdiction of the Court in the attachment suit to issue the attachment, are available to defeat liability on the bond."

The same principle is applied and for the same reasons where execution is issued upon a void judgment. The judgment is open to either direct or collateral attack.

17 R. C. L., page 247.
Olson vs. Nunnally, 28 Pac. 149.
15 R. C. L., page 855.
Lawlor vs. Merritt, 72 Atl. 143.
Kastner vs. Benz, 73 Pac. 68.
Kelso vs. Norton, 87 Pac. 185.
Pac. Nat'l Bank, 124 U. S. 721.
Freeman on Executions, pages 1484, 1485.

In the present case not only was the Court without jurisdiction in making the attachment and entering judgment in No. 1095, but requiring a bond to be executed to the marshal by the claimant Vachon before releasing the property was in fact a fraud.

Deputy Marshal Wiseman, according to his return, attached the property described and took it into his possession, but he did not move it, neither did he place a keeper in charge of it. His failure to retain possession was "by instructions of plaintiff's attorney." Under such a state of facts no bond to release the property could be of any force and effect, for the property had already been released, and requiring a bond to release property that had already [47] been released was a fraud upon the claimant as well as upon the sureties who executed the bond.

The chattel mortgage, though valid as between the parties, must be held fraudulent as to creditors. Assuming that the mortgagor under the terms of the mortgage could remain in possession of the mortgaged chattels and continue the business, replenish the stock, and, after deducting the expense, account to the mortgagee, still under none of the authorities could the mortgage be held valid as to creditors, when it appears that a creditor not a party to the mortgage is a beneficiary. In this case, under the terms of the mortgage, R. H. Miller & Co. were to participate with the mortgagee *pro rata* in the proceeds, and no one for and on behalf of R. H. Miller & Co. made the required affidavit of good

faith. The debt due R. H. Miller & Co. had not been assigned to Peter Vachon, nor had Vachon assumed the debt, so the rule announced in Noyes et al. vs. Ross et al., 59 Pac. 367, does not apply.

Findings of fact and conclusions of law in accordance with the views herein expressed may be prepared and submitted.

Dated at Fairbanks this 26th day of February, 1920.

CHARLES E. BUNNELL,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Feb. 26, 1920. H. Claude Kelly, Clerk. By John E. Pegues, Deputy. [48]

[Title of Court and Cause.]

Objections to Defendants' Proposed Findings of Fact and Conclusions of Law and Requests for Eliminations, Substitutions, Corrections and Additions.

1st. The plaintiff objects that the proposed findings of fact tendered herein by defendants make no reference whatever to the pleadings and the issues raised thereby in this case, No. 1624, or the evidence produced at the trial thereof, which trial took place before the Court without a jury on May 1st and 2d, 1919, except that the finding marked "II" *does* copy and refer to a chattel mortgage introduced in evidence by the defendants.

2d. The plaintiff objects to the proposed find-

ing of fact No. I, and asks that it be stricken out, for the reason that the matter therein contained is not within the issues made by the pleadings and evidence in this case No. 1624 and has no reference thereto in any sense and would only be appropriate (if at all) as a part of a finding of fact in case No. 1095 on the records of this Court, entitled "The Ross-Higgins Company, Plaintiff, versus Alfred M. Ohlsen." It is difficult, however, to see how it could have been a proper finding in case No. 1095, that action being on a promissory note, the consideration of which was not questioned and in which the capacity of plaintiff company to sue was not attacked.

3d. The plaintiff objects to that part of the findings of fact under Roman numerals II and especially that part commencing at the top of page 9, and continuing to paragraph III for the reason that the statements found on said page 9 are inaccurate and untruthful in that they represent that Alfred M. Ohlsen, the mortgagor, [49] out of the proceeds of the sale of goods from April 8th, 1908, the date of the alleged mortgage to August 27th, 1908, the date of the levy of the attachment, paid over to Peter Vachon *all* thereof except small amounts for making change, whereas the evidence showed conclusively that during that period the said Ohlsen paid to R. H. Miller & Company named in said supposed chattel mortgage at least $100.00 out of the proceeds of sales of said goods, and that he did so in conformity to his contract with said R. H. Miller & Company as contained in said instrument.

The plaintiff requests that in addition to the correction above outlined, the following may be added to said paragraph II.

"That said chattel mortgage was not verified as to the good faith thereof by said R. H. Miller & Company either by a member thereof or by any other person on behalf of said company. That between April 8th, 1908, the date of said chattel mortgage and the 27th day of August, 1908, the date of the levy of the attachment in cause No. 1095, entitled Ross-Higgins Company versus Alfred M. Ohlsen, the latter as mortgagor, pursuant to his agreement contained therein with said R. H. Miller & Company, paid to that firm out of the proceeds of sales of the merchandise described in said chattel mortgage, at least as much as $100.00 in cash."

4th. The plaintiff asks that finding of fact No. III commencing on page 9 be repudiated altogether and stricken out, and that the ones given below be substituted therefor because said finding No. III is inconsequential, in that it does not cover the pleadings and evidence in this case No. 1624, but does set out or attempts so to do, some of the facts connected with case No. 1905 on the records of this Court and entitled Ross-Higgins Company versus Alfred M. Ohlsen, but even as to that case is palpably inaccurate. The plaintiff offers the following substitutions and additions to wit: (The Nos., however, should be "I," "II" and "III" and not *"III."*)

I.

"That the plaintiff, The Ross-Higgins Company, was a foreign corporation [50] organized under

the laws of Oregon and was authorized by its articles of incorporation to engage in the mercantile business; that in the years 1900 and 1901 it filed in the offices of the Territorial Secretary and with the Clerk of the District Court for the First Division at Juneau, Alaska, a certified copy of its articles of incorporation, a financial statement, consent to be sued in the Courts of the Territory, and the appointment of an agent upon whom service of process might be made in Alaska and his consent so to act, which said articles of incorporation designated Skagway in said First Division as the principal place of business of said corporation; that for the years 1903, 1904, 1905 and 1906 said company filed with said Territorial Secretary its annual financial statement as required by Chapter 23, Compiled Laws of Alaska and the same statements with the Clerk of the District Court, First Division at Juneau, for the years 1903, 1904 and 1905 and with the Clerk of the District Court, Third now Fourth Division at Fairbanks, its annual statement for the year 1906, in which last mentioned statement said company designated Fairbanks as its principal place of business; that said company did not at any time file with the Clerk of the Court at Fairbanks, certified copies or any copies of its articles of incorporation, consent to be sued in the Courts of the Territory of Alaska, the appointment of an agent upon whom service of process could be made in Alaska and the consent of such agent to act in that capacity; that said company carried on a mercantile business at Skagway, Alaska, in the First Divi-

sion from and including the year 1900 until the spring of 1906, and from the latter date till about September 1st, 1907, at Fairbanks, Alaska; that said company closed out and ceased to do a mercantile business in Alaska under said articles of incorporation by or before September 1st, 1907, and thereafter did not engage in any business of any nature in Alaska except such as was necessary or proper in connection with the payment of bills and collection of debts arising from its previous mercantile transactions."

II.

"That on August 19th, 1907, one Alfred M. Ohlsen was indebted to it in the sum of $1689.72 for merchandise sold to him before that date [51] and on that day executed and delivered to said company his promissory note for said amount as evidence of his said indebtedness; that thereafter and on August 20th, 1908, the plaintiff commenced an action in said court on said promissory note numbered on the records thereof 1095 and entitled "The Ross-Higgins Company, Plaintiff, a Corporation versus Alfred M. Ohlsen, Defendant," in connection with which and at the commencement whereof said plaintiff filed an affidavit in attachment and an attachment bond, both of which were in proper form and substance and in all respects regular and legal on which the clerk of said Court issued a writ of attachment in due and legal form, which writ of attachment was delivered to the marshal of the Third, now Fourth, Division of Alaska, for service; that said marshal sent said writ for service to Frank

C. Wiseman, one of his deputies, whose headquarters and residence were at that time at Dome City on Dome Creek, about two and a half miles distant from the store and place of residence of the defendant Alfred M. Ohlsen on Little Eldorado Creek; that on August 27th, 1908, said Deputy Marshal Wiseman went to Little Eldorado Creek and levied said writ of attachment on all the right, title and interest of Alfred M. Ohlsen, defendant, the owner thereof in and to two log cabins, one used as a store building and the other as a warehouse, both in close proximity, with the stock of merchandise contained in said cabins, took possession of the cabins and the stock of merchandise therein contained, made an inventory of the merchandise and under instructions from plaintiff's attorney went back to his headquarters at Dome City and did not leave a watchman in charge of the attached property; that said attached property was in no apparent danger of destruction or loss from fire, storms or from other causes; that thereafter and on September 7th, 1908, said stock of attached merchandise (a full description of which is made a part of paragraph 2 of plaintiff's amended complaint in this case No. 1624, to which reference is hereby specifically made) was claimed by one Peter Vachon under the chattel mortgage set forth in defendants' finding No. II, and in order to get the possession [52] thereof from the marshal said Vachon caused a forthcoming bond to be executed and delivered to the said marshal, under section 145 Carter's Alaska Code, with the defendants, L. F. Protzman and F. S. Gordon

as sureties (a true and complete copy of which is inserted in paragraph 2 of plaintiff's amended complaint in this action No. 1624, to which reference is hereby especially made), which bond was accepted and approved by said Marshal and by reason of the same the said marshal on that day delivered the possession of said stock of merchandise to said claimant Peter Vachon; that afterwards such proceedings were had in said case No. 1095 that on January 9th, 1911, judgment was given in this Court in favor of Ross-Higgins Company versus the said Alfred M. Ohlsen for the sum of $1404.85, debt and costs, and a decree was entered therein foreclosing the attachment lien of plaintiff on said stock of merchandise and ordering the sale thereof, which said judgment and decree remain of record in said Court, in full force and effect, and in nowise reversed or annulled."

III.

"That on December 9th, 1910, the marshal assigned to the plaintiff Ross-Higgins Company all his right, title and interest in said forthcoming bond; and thereafter and on February 6th, 1911, plaintiff caused a special execution to issue out of said Court on said judgment and decree in said case No. 1095 and placed the same in the hands of the marshal of said Division for service who on February 27th, 1911, demanded of said Peter Vachon and his said bondsmen L. F. Protzman and F. S. Gordon, defendants in this case No. 1624, that they turn over to him said attached merchandise or pay him its value up to the amount of the judgment and accrued interest

and costs in satisfaction of said writ, which demand was not complied with and said special execution was returned unsatisfied and said judgment remains wholly unpaid; that the liability of said bondsmen became fixed by such demand and refusal on February 27th, 1911, more than three years after the Ross-Higgins Company ceased to do business in Alaska under its articles of incorporation; that thereafter and on April 17th, 1911, the plaintiff as assignee of [53] said forthcoming bond commenced this action thereon in said court to recover the amount of said judgment with accrued interest, alleging in its amended complaint, that at the date of said demand, the value of said attached merchandise was $1900.00, which value I find to be established by the evidence.''

5th. The plaintiff requests that paragraph IV of of the proposed findings of fact be eliminated on the ground that the statements therein contained are not within the issues in the case and are hence inconsequential and useless.

6th. The plaintiff asks that Conclusion of Law No. I be stricken out because the same is a combination of finding of fact and conclusion of law and fails to find all the significant facts in that connection in that it fails to find that Ohlsen paid said R. H. Miller & Company at least as much as $100.00 out of the proceeds of the sales of merchandise during the period from April 8th to August 27th, 1908.

7th. Plaintiff asks that conclusion of law designated by the Roman numerals II be stricken out as not within the issue in view of defendants' admission in their answer by failure to deny plaintiff's

allegation in its amended complaint "that it ceased to do business in Alaska under its articles of incorporation in June or July, 1907."

8th. It asks that conclusion of law marked III be eliminated because there is no finding of fact upon which it could be based and is contrary to all the testimony.

9th. That conclusion IV be stricken out because the same is utterly unsupported by the findings and the evidence and in contradiction thereof.

10th. That conclusion V be stricken out for the reason that it is wholly unwarranted by the findings of fact and the evidence heard at the trial.

11th. That one conclusion of law be substituted for all those tendered by defendants to the effect that plaintiff is entitled to judgment for the amount prayed for in its amended complaint with costs.

LOUIS K. PRATT,
Attorney for Plaintiff. [54]

Received copy of the foregoing objections, etc., this 27th day of April, 1920.

A. R. HEILIG,
Attorney for Defendants.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Apr. 27, 1920. H. Claude Kelly, Clerk. By R. H. Geoghegan, Deputy. [55]

[Title of Court and Cause.]

Findings of Fact and Conclusions of Law.

The Court having heard the evidence submitted by

plaintiff and defendants in this case and the arguments of counsel, and filed its opinion herein, does now make and file the following findings of fact and conclusions of law, to wit:

FINDINGS OF FACT.

I.

Plaintiff is a foreign corporation organized under the laws of the State of Oregon, and during the year 1906 and until September, 1907, carried on a mercantile business in Alaska, and during said period its principal place of business in Alaska was in the Town of Fairbanks, in the then Third (now Fourth) Judicial Division thereof; that during said period said corporation from time to time sold and delivered to one Alfred M. Ohlsen goods, wares and merchandise and received payments thereon on account so that, in August, 1907, said Ohlsen was indebted to said plaintiff in the sum of $1,689.72; that said Ohlsen conducted a retail mercantile establishment on Little Eldorado Creek about twenty-five miles from Fairbanks.

II.

That prior to April 7, 1908, Peter Vachon was engaged in the mercantile business in Fairbanks, Alaska, and had sold to said Alfred M. Ohlsen goods, wares and merchandise and received payments on account thereof so that, on April 7, 1908, said Ohlsen was indebted to said Vachon in the sum of $1,418.92; that on said last-mentioned date said Ohlsen requested said Vachon to sell him more goods, which Vachon agreed to do upon condition that said Ohlsen [56] would give him (Vachon) a mortgage upon all

his goods including those then to be sold; that thereupon said Vachon sold and delivered to said Ohlsen goods to the value of $2,433.15, whereupon said Ohlsen executed and delivered to said Vachon a mortgage of which the following is a copy:

CHATTEL MORTGAGE.

This Indenture made and entered into this the 8th day of April, 1908, by and between A. M. Ohlsen, doing business under the name of Fox Trading Company of the Fairbanks Recording District, Territory of Alaska the party of the first part, and Peter Vachon, the party of the second part,

WITNESSETH:

That the party of the first part for and in consideration of the sum of One Dollar, and other good and valuable consideration to him in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, and the extension of the time for payment of certain indebtedness, does hereby sell, assign, transfer and set over unto the party of the second part, and to his heirs and assigns forever the following described property, to wit:

One log building, 20 by 21 feet; one log building 20 by 17 feet adjoining and used as a store; and warehouse 12 by 16 feet, frame with tar-paper roof, together with the land occupied by the same and a reasonable space around them for the convenient use and occupation thereof, which said buildings are situated upon Creek Claim Number Three Above Discovery on Little Eldorado Creek, in the Fairbanks Recording District, Territory of Alaska; the said

buildings now being actually used by the party of the first part in the carrying on of his said business. Also all goods, wares, merchandise, store fixtures, mining tools and implements now contained and being in said buildings, save and except a line of goods, purchased from Sargent and Pinska which consists of miner's wearing apparel.

To have and to hold unto the party of the second part and to his heirs and assigns forever. [57]

This indenture is intended as a mortgage to secure the payment of certain indebtedness now owing by the party of the first part to the party of the second part, and which is evidenced by six promissory notes of even date with this instrument, and which are of the following tenor and purport:

$500.00. Fairbanks, Alaska, April 8th, 1908.

On or before May 15th, 1908, after date, for value received, I promise to pay to the order of Peter Vachon the sum of Five Hundred Dollars in lawful money of the United States with interest thereon after maturity at the rate of twelve per cent per annum. And in case suit or action is instituted to collect this note or any portion thereof I agree to pay such additional sum as attorney's fee as the Court may deem reasonable in the premises.

(Signed) A. M. OHLSEN,

$1500.00. Fairbanks, Alaska, April 8th, 1908.

On or before June 1st, 1908, after date for value received, I promise to pay to the order of Peter Vachon the sum of Fifteen Hundred Dollars in lawful money of the United States with interest thereon

after maturity at the rate of twelve per cent per annum. And in case suit or action is instituted to collect this note or any portion thereof I agree to pay such additional sum as attorney's fee as the Court may deem reasonable in the premises.

(Signed) A. M. OHLSEN,

$500.00. Fairbanks, Alaska, April 8th, 1908.

On or before June 15th, 1908, after date for value received, I promise to pay to the order of Peter Vachon the sum of Five Hundred Dollars in lawful money of the United States with interest thereon after maturity at the rate of twelve per cent per annum. And in case suit or action is instituted to collect this note or any portion thereof I agree to pay such additional sum as attorney's fee as the Court may deem reasonable in the premises.

(Signed) A. M. OHLSEN,

$500.00. Fairbanks, Alaska, April 8th, 1908.

On or before July 1st, 1908, after date for value received, I promise to pay to the order of Peter Vachon the sum of Five Hundred Dollars in lawful money of the United States with interest thereon after maturity at the rate of twelve per cent per annum. And in case suit or action is instituted to collect this note or any portion thereof I agree to pay such additional sum as attorneys' fee as the Court may deem reasonable in the premises.

(Signed) A. M. OHLSEN,

$425.00. Fairbanks, Alaska, April 8th, 1908.

On or before July 15th, 1908, after date for value received, I promise to pay to the order of Peter Vachon Four Hundred and Twenty-five Dollars in

lawful money of the United States with interest thereon after maturity at the rate of twelve per cent per annum. And in case suit or action is instituted to collect this note or any portion thereof I agree to pay such additional sum as attorneys' fee as the Court may deem reasonable in the premises.

(Signed) A. M. OHLSEN. [58]

$427.07. Fairbanks, Alaska, April 8th, 1908.

On or before August 1st, 1908, after date for value received, I promise to pay to the order of Peter Vachon the sum of Four Hundred and Twenty-seven Dollars and seven cents, in lawful money of the United States with interest thereon after maturity at the rate of twelve per cent per annum. And in case suit or action is instituted to collect this note or any portion thereof I agree to pay such additional sum as attorneys' fee as the Court may seem reasonable in the premises.

(Signed) A. M. OHLSEN,

This mortgage is given for the purpose of securing said notes and the whole thereof.

It is the intention of the party of the first part and the party of the second part that this mortgage shall cover all of, and the entire stock of goods, wares, merchandise, store fixtures and property of the party of the first part now in the stores and warehouses situated as hereinbefore set forth, save and except, the goods sold to the party of the first part by Sargent and Pinska as hereinbefore set forth, as well as such other stock of goods, wares, merchandise and store fixtures and property as the party of the first part may hereafter add to said stock for the purpose

of replenishing the same in order that the property hereby mortgaged may realize the largest possible amount by sale. And if at any time it may be necessary to add to or replenish said stock hereby mortgaged in order to make the same more saleable, such goods so added shall be subject to and be included in the terms of this mortgage, whether supplied by the party of the second part or any other person.

It is further agreed between the parties hereto that the party of the first part shall continue to carry on his said business, subject, however, to all of the terms and conditions of this mortgage; and he shall retain the possession of the stock of goods hereby mortgaged as well as that which may hereafter be acquired by him, and said party of the first part may sell and dispose of said stock in his usual course of business upon the following terms and conditions, to wit: The party of the first part shall keep an account of all sales made by him daily in a book kept for that purpose, and shall weekly deposit with the party of the second part all of the proceeds of the preceding weeks' sales, less such an account as [59] may be necessary for change to be kept on hand for the purpose of trade. The amount so retained to be shown by the cash-book.

That the party of the first part shall keep a full, true and correct account of all necessary expenses attending the sale of said goods, and shall make a report thereof weekly to the party of the second part.

The party of the second part is hereby given the power and right to have an agent or representative present in the stores of the party of the first part,

who may participate in the business therein, inspect the books, check up the sales of goods, and all other things that may be necessary to protect the rights of the party of the second part under this mortgage. The salary of said agent shall be borne by the party of the first part.

It is further agreed between the parties hereto that all sales of goods made by the party of the first part shall be for cash, except that upon consent of the party of the second part credit may be given to such persons and for such an amount, and for such period of time as the parties hereafter may agree upon.

It is further mutually understood and agreed between the parties hereto that, whereas, the party of the first part is indebted to R. H. Miller & Co., of Chena, Alaska, in the sum of Thirteen Hundred and Fifty Dollars, for goods, wares and merchandise sold by the said R. H. Miller & Co. to the party of the first part; and

Whereas, it has been agreed that the said R. H. Miller & Co. is to share *pro rata,* according to their respective claims, with the party of the second part in the net proceeds realized from the sale of the goods as hereinbefore provided,

Now, therefore, it is agreed between the party of the first part and the party of the second part, that the party of the second part is to turn over of moneys received by him from the sale of goods, as heretofore provided, to R. H. Miller & Co. that proportion of the net proceeds as the claims of the said R. H. Miller & Co. and the party of the second part shall bear to each other.

Time is of the essence of this agreement and strict performance [60] is essential.

If default shall be made in the payment of the principal sums mentioned in said notes, or, if the party of the first part shall fail to account for the proceeds of the sale of said stock of goods, as heretofore provided, or, if the party of the first part shall fail to perform all of the terms and conditions of this mortgage according to the true intent and meaning thereof; or, if at any time the party of the second part shall deem himself insecure; or, if the party of the first part shall attempt to remove any of the goods, wares and merchandise from the place where they are now stored, except, in the event of a sale thereof, without the consent of the party of the second part, or, if an attachment or execution, or other legal process issue against the property hereby covered by this mortgage, then and thenceforth, it shall be lawful for the party of the second part, his executors, administrators or assigns, or his authorized agent to take said goods, wares, merchandise and chattels, wherever the same may be found, and dispose of the same at public auction or private sale in bulk or in parcel, as in his judgment may realize the greatest amount; or if said second *part* may deem it advisable he may continue to sell the same at retail in the stores of the party of the first part.

All expenses incurred in the taking possession of said goods, or for the care and sale thereof, and all charges touching the same including reasonable attorneys' fees, shall be retained and deducted from the sale of said goods.

In the event that the party of the first part shall violate any of the terms or conditions of this mortgage, then the party of the second part shall deem the principal sums mentioned in all of said notes immediately due and payable; and a failure to pay any of the notes hereinbefore described at the *time shall* become due shall operate to make the remaining unpaid notes immediately due and payable; and the party of the second part may enter and take possession of the property hereby mortgaged wherever the same may be found, peaceably, if may be, or forcibly if necessary. And the party of [61] the second part is hereby authorized to call to his aid and assistance the United States Marshal for the Third Division of the Territory of Alaska to execute the power hereby given him to take possession of said property, as well as such other persons as may be found necessary.

And the United States marshal for the Third Division of the Territory of Alaska is hereby authorized upon request of the party of the second part to advertise and sell the whole or any part of the property hereby mortgaged in the manner prescribed by law for the sale of personal property on execution. The expenses of any such sale or seizure so made by the United States marshal to be deducted from the amount realized from the sale of said goods, as well as all the expense of foreclosure if made, and such expense shall include such attorneys' fee as shall be deemed reasonable in the premises.

It is further expressly agreed between the parties hereto that a failure upon the part of the party of

the first part to live up to all the terms and conditions of this mortgage shall be a default by him of the payment of the principal sums mentioned in the notes.

Upon the full payment of the principal sums in the notes herein mentioned, this mortgage shall be null and void, but until the full amount is paid it shall be of full force and virtue.

In witness whereof the party of the first part has hereunto set his hand and seal this the day and year hereinabove written.

A. M. OHLSEN. (Seal)

Witnesses:

JOHN L. McGINN.
F. W. CARTER.

United States of America,
Territory of Alaska,—ss.

This is to certify that on this the 8th day of April, 1908, personally appeared before me A. M. Ohlsen, to me personally known and known to me to be the individual described in and whose signature is subscribed to the foregoing instrument, and he acknowledged to me that he signed, sealed and delivered the said [62] instrument freely and voluntarily for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and seal this the day and year hereinabove written.

[Seal] JOHN L. McGINN,
Notary Public for Alaska,

United States of America,
Territory of Alaska,—ss.

A. M. Ohlsen, the mortgagor named in the foregoing instrument, and Peter Vachon, mortgagee

named in the foregoing instrument, being each duly sworn, depose and says: That the foregoing mortgage is made in good faith to secure the amounts named therein, without any design to hinder, delay or defraud creditors.

A. M. OHLSEN.
PETER VACHON.

Subscribed and sworn to before me this the 8th day of April, 1908.

[Seal] JOHN L. McGINN,
Notary Public for Alaska,

Which said mortgage was duly filed in the office of the Recorder of Fairbanks Precinct, Territory of Alaska, in which precinct said property was situate on said April 8, 1908; that after giving said mortgage said Ohlsen continued to sell the property covered thereby in the usual course of his business and kept an account of all sales made by him and paid to the said Peter Vachon at intervals of one or two weeks the proceeds of such sales less small amounts kept for making change, and an agent or employee of the said Vachon made frequent trips to said Ohlsen's place of business and checked up his account of sales and expenses of business and received on behalf of said Vachon such surplus as there might be, and both said Ohlsen and said Vachon continued in said method of business until about August 27, 1908, by which time $603.92 had been paid on account of said mortgage debt.

III.

That on August 20, 1908, plaintiff herein commenced an action against the said Ohlsen upon the

claim referred to hereinbefore, and on January 9, 1911, recovered judgment thereon against said Ohlsen for $1,404.85; that in said action plaintiff caused a writ of attachment to issue against the property of said Ohlsen, [63] and on August 27, 1908, one Frank Wiseman, then a deputy U. S. Marshal, went with said writ to the said Ohlsen's place of business and made a memorandum of the goods found in his store building and then left the store building and the goods therein contained and did not remove any part of said goods nor place any person in charge thereof and did not take any of said goods into his custody; that the value of goods of which memorandum was so made was $1900.00; that as soon as the said Vachon learned of the issuance of said attachment, with the permission of the said Ohlsen, who was then in possession thereof, said Vachon took possession of all of the goods belonging to said Ohlsen covered by said mortgage and sold the same for the best price obtainable, which, however, was not sufficient to pay the sums due the said Vachon and secured by said mortgage.

IV.

That plaintiff did not at any time file in the office of the Clerk of the District Court for the then Third (now Fourth) Division of the Territory of Alaska, a duly authenticated copy or any copy of its charter or articles of incorporation nor any other statement required by law, excepting its annual report for the year 1906.

CONCLUSIONS OF LAW.

I.

That said mortgage from Ohlsen to Vachon was given in good faith to secure the amount therein named and was valid between said parties, but was and is invalid as against other creditors of said Ohlsen because no one made the required affidavit of good faith on behalf of R. H. Miller & Co., therein mentioned as beneficiary.

II.

That the plaintiff while carrying on business in Fairbanks, Alaska, failed to comply with the provisions of Chapter 23, Title XII of the Compiled Laws of the Territory of Alaska relating to foreign corporations, and the Court is prohibited from enforcing its said [63A] claim against the defendants herein.

III.

That the claim of the plaintiff herein against the defendants upon the bond sued upon in this action is invalid and unenforceable, and said bond is without valid consideration.

IV.

That no valid attachment of the property described in the complaint and referred to in said bond was ever made on behalf of the plaintiff, and the bond executed for the supposed release of the same from attachment was without consideration and is null and void.

V.

That defendants are entitled to judgment in their favor, and that plaintiff take nothing by this action.

Dated at Fairbanks, Alaska, this 8th day of May, 1920.

By the Court.

CHARLES E. BUNNELL,
District Judge.

Entered in Court Journal No. 15, page 42.

[Endorsed]: Lodged April 22, 1920. Filed in the District Court, Territory of Alaska, 4th Div. May 8, 1920. H. Claude Kelly, Clerk. [64]

(Title of Court and Cause.)

Exceptions to Findings of Fact and Conclusions of Law.

The plaintiff excepts to the findings of fact and conclusions of law made by the Court and filed herein on May 8, 1920, as follows:

I.

Plaintiff excepts to the first finding of fact for the reason that the same is not within the issues and evidence in the case, and is in itself incomplete and inconsequential.

II.

The plaintiff excepts to the second finding of fact for the reason that it covers only part of the facts as shown by the evidence in reference to the chattel mortgage mentioned therein, and omits important phases of the evidence bearing on the validity of said mortgage.

III.

The plaintiff excepts to the 3d finding of fact be-

cause the same is not supported by the evidence and is contrary thereto.

IV.

The plaintiff excepts to the 4th finding of fact because the same is not within the issues made by the pleadings.

V.

The plaintiff excepts to the first conclusions of law because the same is in part a finding of fact, and in that respect omits important parts of the evidence.

VI.

The plaintiff excepts *of* the 2d conclusion of law for the reason that the same is wholly unsupported by the pleadings, evidence [65] and findings of fact.

VII.

The plaintiff excepts to the 3d conclusion of law because there is no finding of fact upon which the same could be or is based and the same is contrary to all the testimony.

VIII.

The plaintiff excepts to the 4th conclusion of law because the same is not supported by any sufficient finding of fact, and is in contradiction to all the evidence herein.

IX.

The plaintiff excepts to the 5th conclusion of law for the reason that the same is not warranted by the findings of fact and the evidence produced at the trial.

X.

The plaintiff excepts to the action of the Court in

denying and overruling its "Objections to the Findings of Fact proposed by Defendants (adopted and signed by the Judge) and Requests for Eliminations, Substitutions, Corrections and Additions," as such objections, etc., appear in the files in this case, set out in full in its formal objections to such findings and requests in connection therewith.

LOUIS K. PRATT,
Attorney for Plaintiff.

Due service of the foregoing exceptions to findings of fact and conclusions of law, by receipt of copy thereof, acknowledged this 11th day of May, 1920.

A. R. HEILIG,
Attorney for Defendants.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. May 11, 1920. H. Claude Kelly, Clerk. [66]

[Title of Court and Cause.]

Judgment.

Be it remembered that this action came on regularly for trial at the General March, 1919, Term of above-named court, by the court without a Jury, both plaintiff and defendants by their attorneys having in open court waived jury trial, which waiver was duly entered in the journal of said court; then appeared the plaintiff by its attorney, L. K. Pratt, and the defendants by their attorney, A. R. Heilig. Whereupon, on May 1, 2, 6, and 7, 1919, the parties above-named submitted their evidence and said at-

torneys argued said cause and the Court took the same under advisement; that thereafter the Court rendered and filed an opinion in said cause in favor of defendants, and on May 8, 1920, made, gave and filed with the clerk of said court its decision in writing, stating the facts found and the conclusions of law separately, which decision has been entered in the journal of said court; that thereupon plaintiff filed a motion for a new trial, and the same having been duly considered by the court, is now overruled, and upon consideration of the premises it is now

ORDERED, ADJUDGED, AND DECREED that the plaintiff take nothing by its action, and that the defendants recover from plaintiff their costs and disbursements herein.

Dated May 11, 1920.

By the Court.

CHARLES E. BUNNELL,
District Judge.

Entered in Court Journal No. 15, page 54.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. May 11, 1920. H. Claude Kelly, Clerk. [67]

[Title of Court and Cause.]

Motion for New Trial.

The plaintiff moves the Court for an order setting aside its decision and verdict as contained in the findings of fact and conclusions of law filed herein May 8th, 1920, and granting it a new trial, on the following grounds:

I.

Because the Court erred in its findings of fact Nos. 1, 2, 3, and 4, in that finding No. 1 is not within the issues, as made by the pleadings and evidence, finding No. 2 only partially covers the testimony on the subject therein referred to, finding No. 3 is contrary to all the testimony, and finding No. 4 is outside the issues and inconsequential.

II.

Because the Court erred in its conclusions of law Nos. 1, 2, 3, 4, and 5, in the particulars that:

Conclusion No. 1 is a combination of finding of fact and conclusion of law; conclusion No. 2 is unsupported by the pleadings, evidence and findings of fact; the 3d conclusion of law has no finding of fact as a basis and is contrary to the evidence; the 4th conclusion is not supported by a sufficient finding of fact and is in contradiction to all the evidence introduced at the trial, and the 5th conclusion is wholly unwarranted by the issues, evidence, and findings.

III.

Because the Court erred in overruling plaintiff's "Objections [68] to the findings of fact and conclusions of law proposed by defendants and its requests for eliminations, substitutions, corrections and additions thereto," and in signing and filing findings of fact and conclusions of law as proposed and tendered by defendants, the said "objections, etc.," being on file herein, to which reference is made.

IV.

Because said findings of fact, conclusions of law

and verdict are contrary to law are not supported by sufficient evidence and are contrary thereto.

The record and files in the case will be used by plaintiff at the hearing of this motion.

LOUIS K. PRATT,
Attorney for Plaintiff.

Due service of the foregoing motion for new trial by receipt of copy thereof, acknowledged this 11th day of May, 1920.

A. R. HEILIG,
Attorney for Defendants.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. May 11, 1920. H. Claude Kelly, Clerk. [69]

[Title of Court and Cause.]

General March, 1920, Term—Fifty-fourth Court Day.

Tuesday, May 11, 1920.

Order Denying Motion for New Trial.

And now appeared in court A. R. Heilig, Esq., counsel for the defendants herein, and stated to the Court that he had prepared a notice of hearing on motion for new trial filed by plaintiff herein, and attempted to serve the same on Louis K. Pratt, Esq., attorney for plaintiff, and being unable to do so, the same was served upon the said Louis K. Pratt, Esq., by L. R. Gillette, at the residence of the said Louis

K. Pratt, Esq., as more fully appears by the affidavit of said L. R. Gillette; whereupon the Court, upon an examination of the said motion for new trial, and consideration of the same, and being of the opinion that the same should be denied, denied the same and entered judgment for defendants.

CHARLES E. BUNNELL,
District Judge. [70]

[Title of Court and Cause.]

Assignments of Errors.

The plaintiff below and plaintiff in error in the United States Circuit Court of Appeals for the Ninth Circuit will rely for a reversal by said Circuit Court of Appeals of the judgment against it in the lower court on the following errors appearing in the record of the case, to wit:

1st. The Court erred in overruling plaintiff and plaintiff in error's motion to strike out a part of the 1st paragraph of its amended complaint and parts of the answer.

2d. The Court erred in overruling the motion to strike out portions of the amended answer presented by plaintiff and plaintiff in error.

3d. The Court erred in overruling the demurrer of plaintiff and plaintiff in error to certain of the supposed affirmative defenses appearing in the amended answer.

4th. The trial Court erred in making and signing the 1st, 2d, 3d, and 4th findings of fact and in

its conclusions of law numbered from 1 to 5, inclusive, and in overruling and disregarding the exceptions thereto tendered by plaintiff and plaintiff in error.

5th. The Court erred in disregarding and in refusing to yield to the "Objections, eliminations, substitutions, corrections, and additions," as affecting the findings of fact and conclusions of law prepared by defendants' attorney and afterwards signed and filed in the case, which "Objections, eliminations, etc.," were filed at the proper time and appear as a part of the record herein. [71]

6th. The Court erred in rendering judgment in favor of the defendants and against plaintiff below.

LOUIS K. PRATT,
Attorney for Plaintiff Below and Plaintiff in Error.

Received a copy of the foregoing assignments of error this 17th day of February, 1921.

A. R. HEILIG,
Attorney for Defendants and Defendants in Error.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Feb. 17, 1921. H. Claude Kelly, Clerk. [72]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Territory of Alaska,
Fourth Division,—ss.

I, H. Claude Kelly, Clerk of the District Court, Territory of Alaska, Fourth Division, do hereby

certify that the foregoing, consisting of eighty-two pages, numbered from 1 to 82, inclusive, constitutes a full, true and correct transcript of the record on writ of error in cause No. 1624, The Ross-Higgins Company, a Corporation, Plaintiff and Plaintiff in Error, vs. L. F. Protzman and F. S. Gordon, Defendants and Defendants in Error, and was made pursuant to and in accordance with the praecipe of the plaintiff in error filed in this action, and made a part of this transcript, and by virtue of the citation issued in said cause and is the return thereof in accordance therewith, and I certify that the writ of error, citation on writ of error and order enlarging return day, annexed hereto, are the originals thereof.

And I do further certify that the index thereof, consisting of page i, is a correct index of said transcript; also that the cost of preparing said transcript and this certificate, amounting to Thirty-seven Dollars and 85/100 ($37.85), has been paid to me by counsel for plaintiff in error in this action.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this court this 18th day of March, A. D. 1921.

[Seal] H. CLAUDE KELLY,
Clerk of the District Court, Territory of Alaska,
Fourth Division.

Writ of Error.

THE UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judge of the District Court for the Territory of Alaska, Fourth Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment in said District Court before you in an action at law wherein The Ross-Higgins Company, a corporation, was the plaintiff and is the plaintiff in error in the Appellate Court and L. F. Protzman and F. S. Gordon were the defendants and are the defendants in error in the Appellate Court, a manifest error hath happened to the great damage of the said plaintiff below and plaintiff in error, as by its petition for a writ of error appears:

We, being willing that error, if any hath been, should be corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, including a copy of the typewritten opinion of the trial Judge, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 19th day of March, A. D. 1921, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected,

the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, the 17th day of February, 1921.

[Seal] H. CLAUDE KELLY,
Clerk of the District Court for the Territory of Alaska, Fourth Division.

The foregoing writ is hereby allowed.

CHARLES E. BUNNELL,
District Judge.

Due service of the foregoing writ of error, by receipt of copy thereof, acknowledged at Fairbanks, Alaska, this 17th day of February, 1921.

A. R. HEILIG,
Attorney for Defendants Below and Defendants in Error.

No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. The Ross-Higgins Company, a Corporation, Plaintiff in Error, vs. L. F. Protzman and F. S. Gordon Defendants in Error. Writ of Error. Filed in the District Court, Territory of Alaska, 4th Div. Feb. 17, 1921. H. Claude Kelly, Clerk. By ————, Deputy.

Citation on Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America to L. F. Protzman and F. S. Gordon, Defendants Below and Defendants in Error, and to A. R. Heilig, Their attorney:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the District Court for the Territory of Alaska, Fourth Division, wherein The Ross-Higgins Company, a corporation, plaintiff in the court below, is plaintiff in error, and L. F. Protzman and F. S. Gordon, defendants in the court below, are defendants in error, to show cause, if any there be, why the judgment and order in the said writ of error mentioned should not be corrected, set aside and reversed, and speedy justice should not be done to the plaintiff in error in that behalf.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States of America, this 17th day of February, 1921, and of the Independence of the United States the one hundred and forty-sixth.

CHARLES E. BUNNELL,

Judge of the District Court for the Territory of Alaska, Fourth Judicial Division.

[Seal] Attest: H. CLAUDE KELLY,

Clerk.

Due service of the foregoing citation on writ of error by receipt of copy thereof acknowledged at Fairbanks, Alaska, this 17th day of February, 1921.

A. R. HEILIG,
Attorney for Defendants Below and Defendants in Error.

No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. The Ross-Higgins Company, a Corporation, Plaintiff in Error, vs. L. F. Protzman and F. S. Gordon, Defendants in Error. Citation on Writ of Error. Filed in the District Court, Territory of Alaska, 4th Division. Feb. 17, 1921. H. Claude Kelly, Clerk. By————, Deputy.

[Title of Court and Cause.]

Order Enlarging Return Day of Writ of Error.

On application of the said plaintiff in error, by reason of the great distance from Fairbanks, Alaska, to San Francisco, California, and the delays and uncertainties in the transmission of mail matter between the said points,—

IT IS ORDERED that the return day of the writ of error allowed in this cause on the ~~19th~~ 17 C. B. February, day of ~~March~~ 1921, be enlarged to the 10th day of May, 1921.

Dated at Fairbanks, Alaska, this 17th day of February, 1921.

CHARLES E. BUNNELL,
District Judge.

Entered in Court Journal No. 15, page 83.

Service of the foregoing order enlarging the return day of the writ of error herein acknowledged by a receipt of copy this 17th day of February, 1921.

A. R. HEILIG,
Attorney for Defendants Below and Defendants in Error.

Filed in the District Court, Territory of Alaska, 4th Div. Feb. 17, 1921. H. Claude Kelly, Clerk. By ————, Deputy.

[Endorsed]: No. 3676. United States Circuit Court of Appeals for the Ninth Circuit. The Ross-Higgins Company, a Corporation, Plaintiff in Error, vs. L. F. Protzman and F. S. Gordon, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Territory of Alaska, Fourth Division.

Filed April 20, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

At a stated term, to wit, the October Term, A. D. 1920, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court-room thereof, in the City and County of San Francisco, in the State of California, on Monday, the sixth day of June, in the year of our Lord one thousand nine hundred and twenty-one. Present: The Honorable WILLIAM W. MORROW, Circuit Judge, Presiding; The Honorable WILLIAM H. HUNT, Circuit Judge.

No. 3676.

THE ROSS-HIGGINS COMPANY,
Plaintiff in Error,

vs.

L. F. PROTZMAN et al.,
Defendants in Error.

Motion for Leave to File Amended Assignments of Error.

ORDERED motion of plaintiff in error filed May 18, 1921, for leave to file amended assignment of errors granted.

In the District Court, Fourth Judicial Division, Territory of Alaska.

No. 1624.

THE ROSS–HIGGINS COMPANY, a Corporation,

Plaintiff,

vs.

L. F. PROTZMAN and F. S. GORDON,

Defendants.

Amended Assignment of Errors.

The plaintiff below and plaintiff in error in the United States Circuit Court of Appeals for the 9th Circuit (leave of Court first having been obtained in that behalf), will rely for a reversal of the judgment against it in the lower court on the following errors appearing in the record of the case, to wit:

1st. The Court erred in overruling plaintiffs and plaintiffs in errors motion to strike out a part of the 1st paragraph of its amended complaint and the 1st and 2d affirmative defense in the answer, the grounds of the motion being that the matter objected to and asked to be stricken out was sham, frivolous and immaterial, and further, that as to the supposed defenses the defendants were estopped and barred from interposing the same, and that the 2d supposed defense was also contradictory to the allegations of the 3d or last affirmative defense.

2d. The Court erred in overruling the plaintiff and plaintiff's in error's motion for "orders affect-

ing the amended answer," which motion pointed out that the first affirmative defense therein attempted to raise an immaterial issue; that the 2d was indefinite in not giving the name of the third person who was said to own the attached property at the date of levy and the 3d was the same matter previously stricken by the trial Court from the original answer as sham, frivolous and immaterial, that it was subject to the same criticism in the amended answer, and that defendants were estopped in the admissions contained in the amended answer from raising the questions sought to be brought forward by said 3d supposed defense.

3d. The Court erred in overruling plaintiff and plaintiff's in error's demurrer to the 1st, 2d and 3d affirmative defenses in the amended answer on the ground that the allegations of fact in each were insufficient in law to constitute a defense to the cause of action set up in the amended complaint.

4th. The trial Court erred in making and signing the said 1st and 4th findings of fact and the corresponding conclusions of law numbered 2 and 3, on the subject of the duty of foreign corporations to file certified copies of articles of incorporation, financial statements, etc., with the Secretary of the Territory and District Clerk of the Division where the business was carried on, the same in view of the admissions contained in the pleadings and the findings of fact as filed and in the court's "decision" not being any part of the issues to be tried, the said admissions and findings showing that plaintiff had quit doing business in Alaska long before the forth-

coming bond, the basis of plaintiff's action, had been taken; the 3d finding of fact and the 4th and 5th conclusions of law are erroneous because contrary to the admissions contained in the pleadings and the findings of fact signed and filed and in the court's "decision," such admissions and findings showing conclusively that the atachment proceedings in connection with which the foregoing bond sued out was executed were regular and valid and that defendants were estopped to raise the question of their invalidity; there was also error in disallowing plaintiff's exceptions to the findings and conclusions.

5th. The Court erred in disregarding and in refusing to yield to and adopt the objections, substitutions, corrections and additions as affecting the findings of fact and conclusions of law as signed and filed in the case, which "objections, eliminations, etc.," were filed at the proper time and appear as a part of the record herein.

6th. The Court erred in rendering judgment in favor of the defendants and against plaintiff below.

LOUIS K. PRATT,
Attorney for Plaintiff.

Service of the foregoing proposed amended assignment of errors by receipt of copy acknowledged this 27th day of April, 1921.

A. R. HEILIG,
Attorney for Defendants.

[Endorsed]: No. 3676. District Court, Fourth Judicial Division, Territory of Alaska. The Ross-Higgins Company, a Corporation, Plaintiff, vs. L.

F. Protzman and F. S. Gordon, Defendants. Amended Assignment of Errors. Filed May 18, 1921. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

THE ROSS-HIGGINS COMPANY, a Corporation,

Plaintiff,

vs.

L. F. PROTZMAN and F. S. GORDON,

Defendants.

Stipulation Re Printing Record.

It is stipulated between the attorneys for the parties respectively that in printing the record in this case for use in said court all captions may be omitted after the title of the cause has once been printed, and the words "Title of Court and Cause" and the name of the paper or document substituted therefor.

After printing the assignment of errors, writ of error and citation, other papers connected with the writ of error need not be inserted in the record. Otherwise than as above indicated, we desire that the transcript of the case be printed in its entirety.

Dated at Fairbanks, Alaska, this 17th day of Feb., 1921.

LOUIS K. PRATT,
Attorney for Plaintiff in Error.
A. R. HEILIG,
Attorney for Defendants in Error.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Feb. 17, 1921. H. Claude Kelly, Clerk. By ————, Deputy.

No. 3676. United States Circuit Court of Appeals for the Ninth Circuit. Ross-Higgins Company vs. Protzman et al. Stipulation Re Printing of Record. Filed Apr. 19, 1921. F. D. Monckton, Clerk.